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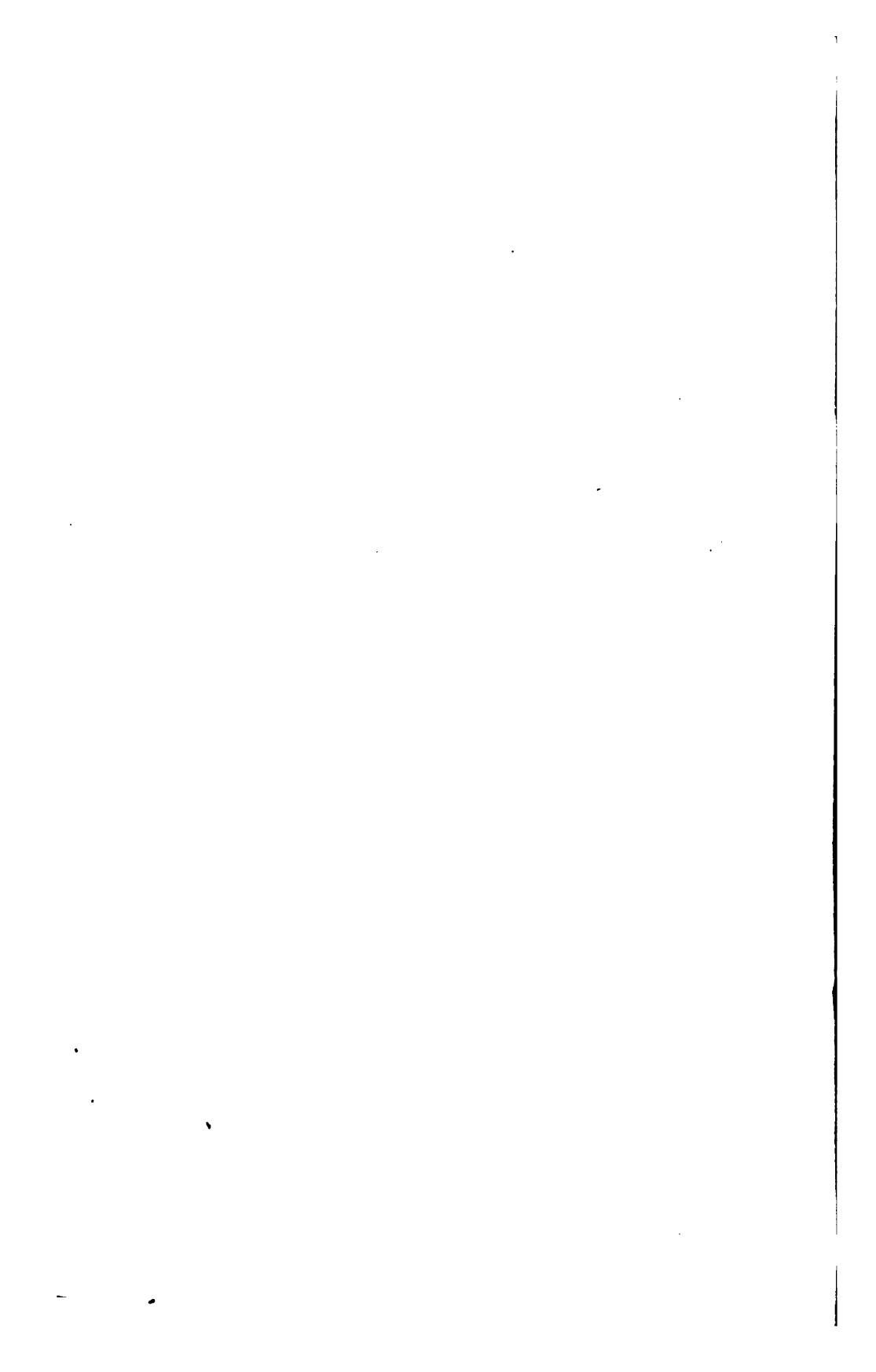
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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

**WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.**

By JOHN W. KERN,
OFFICIAL REPORTER.

VOL. 109,
CONTAINING CASES DECIDED AT THE NOVEMBER TERM,
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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. BYRON K. ELLIOTT. * †
HON. ALLEN ZOLLARS. ‡
HON. JOSEPH A. S. MITCHELL. §
HON. WILLIAM E. NIBLACK. †
HON. GEORGE V. HOWK. ‡

* Chief Justice at the November Term, 1886.

† Term of office commenced January 3d, 1887.

‡ Term of office commenced January 1st, 1883.

§ Term of office commenced January 6th, 1885.

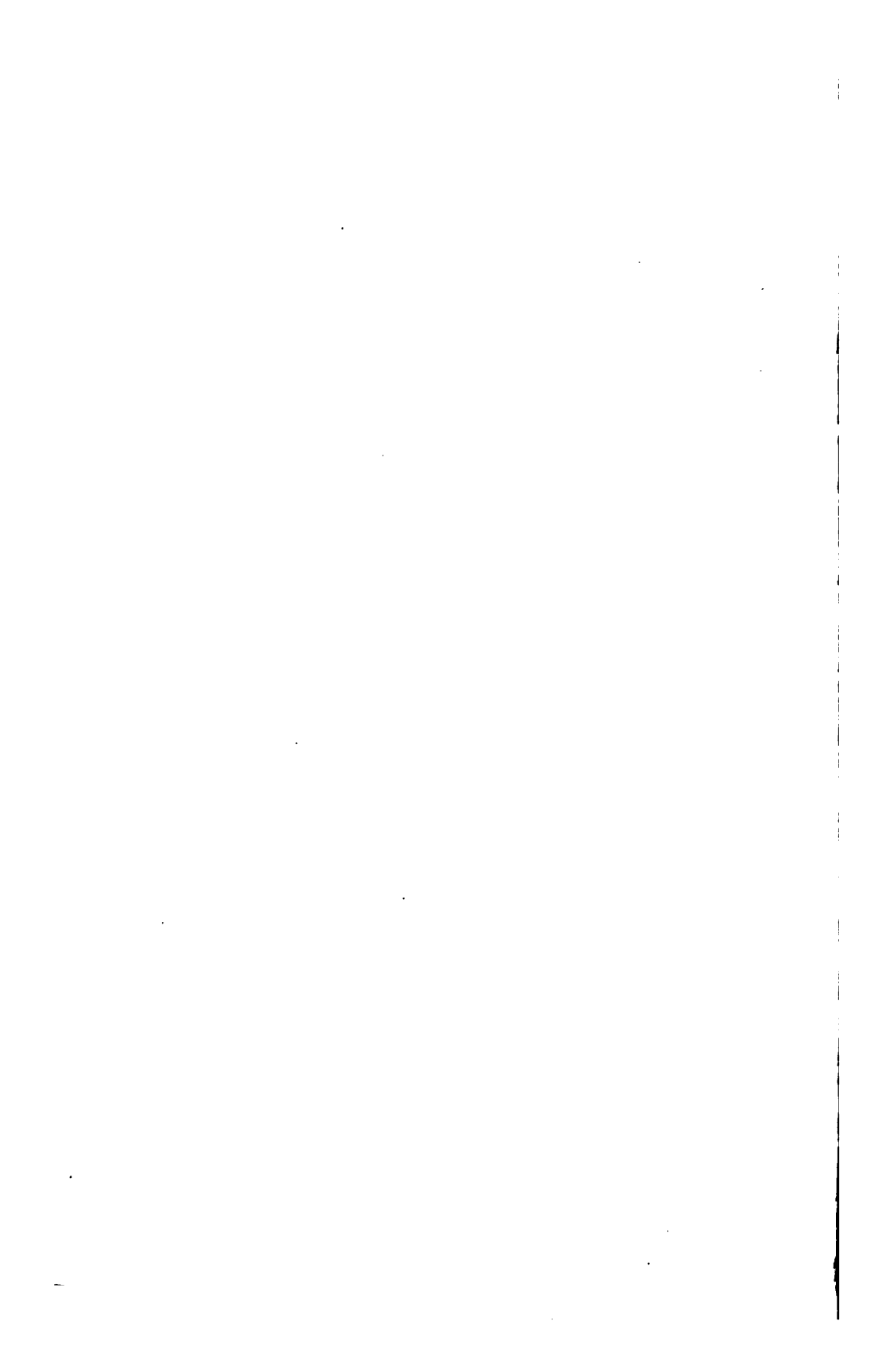
(xx)

OFFICERS
OF THE
SUPREME COURT.

CLERK,
WILLIAM T. NOBLE.

SHERIFF,
MYRON NORTH.

LIBRARIAN,
CHARLES E. COX.



C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1886, IN THE SEVENTY-
FIRST YEAR OF THE STATE.

100	1
194	594
186	586
127	909
109	1
183	189
183	204
109	1
186	586

No. 13,491.

SMITH *v.* MYERS.

INJUNCTION.—*Jurisdiction.*—*Election Returns.*—*Alleged Illegality.*—*Custodian.*—*Secretary of State.*—*Speaker of House of Representatives.*—The courts have no jurisdiction of a suit to enjoin the secretary of state from delivering to the speaker of the house of representatives the sealed returns, alleged to be wrongful and illegal, of an election for Lieutenant-Governor, which are directed to the speaker, as required by law, in care of the secretary, and are to be delivered to him by the latter.

SAME.—*Jurisdiction of Subject-Matter.*—*Consent of Parties.*—Jurisdiction over the subject-matter must be given by law; it can not be conferred by consent of the parties.

From the Marion Circuit Court.

D. Turpie, J. B. Brown, J. W. Gordon and J. C. F. Gordon, for appellant.

L. T. Michener, Attorney General, *W. H. H. Miller* and *S. J. Peelle,* for appellee.

ELLIOTT, C. J.—Stripped of unnecessary verbiage, and ex-

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hibited in a condensed form, the material allegations of the complaint are these: That the appellant was qualified to hold the office of senator in the General Assembly of the State; that he was elected to that office on the 7th day of November, 1884, for the term of four years, and still remains in office; that on the 13th day of April, 1885, he was chosen President of the senate of Indiana, accepted that position, and still holds it, ready, willing and qualified to discharge its duties; that on the 7th day of November, 1884, Mahlon D. Manson was elected to the office of Lieutenant-Governor, for the term of four years, and that his term of office began on the second Monday in January, 1885; that Mahlon D. Manson vacated the office to which he was elected in July, 1886, by accepting the office of collector of internal revenue for the seventh district of Indiana; that by reason of the vacancy created by the acceptance of the Federal office by Lieutenant-Governor Manson, the appellant is, to quote literally from the complaint, "entitled to discharge the duties of said office as required and provided by the Constitution and laws of the State of Indiana, and to receive the pay and emoluments of the said office;" that, on the 2d day of November, 1886, a general election was held in the State of Indiana, and four persons procured themselves to be voted for by the electors of the State as candidates for the office of Lieutenant-Governor; that at the proper time these votes were canvassed by the election officers, and on the day following the canvass in all the counties of the State, the clerks of the respective counties did make out certificates, duly signed and sealed, and did forward them by mail to Indianapolis, addressed to the speaker of the house of representatives of the State of Indiana, in the care of William R. Myers, the appellee, as secretary of state; that the secretary of state, William R. Myers, received in due course of mail the sealed packages transmitted to him by the clerks of the several counties of the State, and that he now has custody of the sealed packages, and threatens to deliver them to the speaker of the house of rep-

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representatives, and that he will so deliver them unless enjoined by the court; that the certificates and returns contained in the sealed packages, of which the secretary of state has possession, are wrongful and illegal; that, to again quote from the complaint, the said William R. Myers ought not to be permitted "to deliver the same to the speaker of the house of representatives, thereby assisting in casting a cloud upon the right and title of the plaintiff to discharge the office of Lieutenant-Governor." The prayer of the complaint is, "that the said William R. Myers, secretary for the State of Indiana, as aforesaid, be perpetually enjoined from delivering the sealed packages in his possession to the speaker of the house of representatives."

The question which faces us at the threshold is one of controlling influence, and the answer to it must rule our decision. The question of jurisdiction is always one of importance, but in no case is it more important than where, as here, the extraordinary remedy of injunction is invoked to control the acts of officers holding high places in the government of the State. In cases like this, where the judicial department is asked to enjoin an officer of a different branch of the government from performing an official act, the question is always one of dominating force, and sometimes of perplexing difficulty. On the one hand, no consideration of policy or convenience should induce the courts to assume to exercise a power that does not belong to them, nor, on the other hand, should any consideration of that kind, or of any kind, induce them to surrender a power which it is their duty to exercise. The assumption of a power not vested in them would be a violation of the Constitution, since it would be an usurpation of a power conferred upon another branch of the government. It would disturb the system of checks and balances which the Constitution has so carefully constructed, and which the courts have ever guarded with most scrupulous care. The question is as important as any that the courts encounter in the whole range of judicial investigation, and it is always re-

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garded as one of great delicacy, to be considered with care and disposed of with caution. The question of jurisdiction is never in any case a technical or subordinate one, and certainly it is not so in the one before us.

It often becomes a question in cases of the general class to which the present belongs, whether a suit for injunction can be maintained in any case where the title to a public office is involved, and by many courts it is held that in such cases there is no jurisdiction. *Foster v. Moore*, 32 Kan. 483; *Gilroy's Appeal*, 100 Pa. St. 5; *Stone v. Wetmore*, 42 Ga. 601; *Kilpatrick v. Smith*, 77 Va. 347; *Jones v. Commissioners, etc.*, 77 N. C. 280; *Patterson v. Hubbs*, 65 N. C. 119; *Moulton v. Reid*, 54 Ala. 320; *Beebe v. Robinson*, 52 Ala. 66; *People v. Draper*, 24 Barb. 265; *Planters' Com. Ass'n v. Hanes*, 52 Miss. 469; *Sheridan v. Colvin*, 78 Ill. 237; *People v. Forquer*, Breese (Ill.) 104; *Hulseman v. Rems*, 41 Pa. St. 396; *Commonwealth v. Baxter*, 35 Pa. St. 263; *State v. Governor*, 1 Dutch. (N. J.) 331; *Peck v. Weddell*, 17 Ohio St. 271; *Ingerson v. Berry*, 14 Ohio St. 315; *Markle v. Wright*, 13 Ind. 548; *Beal v. Ray*, 17 Ind. 554.

But the case before us is narrowed to a small compass by the provisions of our Constitution and our statute, and it is unnecessary for us to enter into the broad field covered by the cases to which we have referred. We abstain, therefore, from any discussion of the general doctrine declared by those cases. Nor do we deem it necessary to determine the relation of the remedy of mandamus to that of injunction, for it is not necessary to a decision of the ruling question as it is here presented; nor is it necessary to determine whether the title to an office may be tried in an action for mandamus. All that we are required to decide, all that it is proper for us to decide, and all that we do decide is, that injunction will not lie in such a case as the one presented to us by the record.

The Constitution of the State provides that "The returns of every election for Governor and Lieutenant-Governor shall be sealed up and transmitted to the seat of government, di-

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rected to the speaker of the house of representatives, who shall open and publish them in the presence of both houses of the General Assembly." Art. 5, section 4. The provisions of our statute are : " Each clerk of the circuit court shall, on the day following the return day of an election for Governor and Lieutenant-Governor, make out, at full length, two certified statements, under the seal of his court, of the number of votes each candidate received ; one of which he shall transmit to the speaker of the house of representatives of the next General Assembly, by his senator or representative, who shall deliver the same to such speaker on or before the second day of the session, and the other certified statement shall be transmitted by mail to Indianapolis, directed to said speaker, and to the care of the secretary of state, by whom the same shall be delivered to the speaker on or before the second day of the session." R. S. 1881, section 4729.

It appears from these constitutional and statutory provisions, that the papers sent by the clerks of the counties of the State to Indianapolis, addressed to the speaker of the house of representatives, in the care of the secretary of the state, are in the hands of the secretary as a mere custodian, charged with the duty of delivering them to the speaker of the house of representatives. Nothing that the secretary can do can give validity to the papers if they have none by force of law, and nothing he can do can deprive them of validity if under the law they are valid. If the secretary may be enjoined from performing the imperative duty cast upon him by law, then, upon like reasoning, so may the clerks of the counties, and the members of the General Assembly to whom duplicates of such papers are entrusted for delivery to the officer to whom they are addressed, and to whom the law declares they shall be delivered. We doubt whether papers directed by law to be delivered to a designated officer can, in any case, be stopped by injunction in the hands of a mere custodian charged by law with the duty of delivering them ; but, however this may be, we are clear that they can not be stopped

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by injunction in the hands of the custodian in such a case as that which this record presents to us. If the courts should enjoin the secretary of state, no substantial result would be accomplished, because duplicates of the papers in his custody are in the hands of members of the General Assembly, who are charged by law with the duty of delivering them to the speaker, to whom they are addressed, and the courts can not enjoin legislators from performing a duty cast upon them by the law. Decrees of courts in injunction cases can only be enforced by punishing, by fine or imprisonment, those who disregard them, and it can not be true that courts can fine or imprison legislators for doing what the law directs them to do. It is a general principle, well grounded in reason and firmly established by authority, that courts will not issue writs of injunction in cases where they would be unavailing, and a writ would be unavailing here, for the courts can not inflict punishment upon officers for doing what the law commands them to do.

It is a principle of constitutional law, declared in our Constitution and enforced by many decisions of our own and other courts, that the departments of government are separate and distinct, and that the officers of one department shall not invade any other. To interfere by injunction in this case would involve a violation of this fundamental principle, as a conflict between two great departments of the government would result from an exercise of the jurisdiction invoked by the appellant. The General Assembly has power to compel the attendance of persons at its sessions, and to compel the production of papers which are necessary to enable it to justly and intelligently discharge its duties and exercise its functions. If the judiciary should enjoin the secretary of state from delivering to the speaker the papers described in the complaint, and the General Assembly should demand their delivery to the officer to whom they are addressed, a conflict of authority would arise which no tribunal could effectually determine. If the secretary should in such

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a case yield to the demand of the General Assembly, he would be in contempt of the authority of the court, and liable to punishment; if, on the other hand, he should disobey the command of the General Assembly, he would be in contempt of its authority, and subject to punishment. If the General Assembly should deem it the duty of the secretary of state to deliver the papers, it would not require the aid of the courts to compel its performance, for it possesses the power to coerce the production of papers and documents. R. S. 1881, section 4736.

There is, we know, some conflict in the cases as to whether the Legislature possesses the general inherent power to punish for contempt; but it is agreed without substantial diversity of opinion, that it may make and enforce orders for the production of papers in matters in which it has power to act. *Anderson v. Dunn*, 6 Wheat. 204; *Kilbourn v. Thompson*, 103 U. S. 168; *Mariner v. Dyer*, 2 Greenl. 165; *Yates v. Lansing*, 9 Johns. 395; *United States v. Hudson*, 7 Cranch, 32; *Tenney's Case*, 23 N. H. 162; *State v. Copp*, 15 N. H. 212; *Ex parte Dalton*, 5 N. E. Rep. 136.

It is apparent, therefore, that as, on the one hand, the General Assembly would not require the aid of the courts, by mandamus or otherwise, to compel the production of papers addressed, by direction of the Constitution and the statute, to the presiding officer of one of its branches, so, on the other hand, the courts can not by injunction restrain it from obtaining those papers, nor by indirection produce that result by stopping them in the hands of one whom the law makes a mere custodian.

Many cases assert that courts can not control by injunction, or by any other writ, the exercise of a purely legislative or executive power. *Vicksburg v. Lowry*, 61 Miss. 102 (48 Am. R. 76); *Hawkins v. Governor*, 1 Ark. 570 (33 Am. Dec. 346); *State v. Drew*, 17 Fla. 67; *Low v. Towns*, 8 Ga. 360; *People v. Bissell*, 19 Ill. 229; *People v. Yates*, 40 Ill. 126; *State v. Warmoth*, 22 La. Ann. 1; *In re Dennett*,

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32 Maine, 508; *Rice v. Austin*, 19 Minn. 103 (18 Am. R. 330); *State v. Governor*, 39 Mo. 388; *Mauran v. Smith*, 8 R. I. 192 (5 Am. R. 564); *Turnpike Co. v. Brown*, 8 Baxter, 490 (35 Am. R. 713); *Houston, etc., R. W. Co. v. Randolph*, 24 Texas, 317; *City of Chicago v. Evans*, 24 Ill. 52; *Smith v. McCarthy*, 56 Pa. St. 359; *Des Moines Gas Co. v. City of Des Moines*, 44 Iowa, 505 (24 Am. R. 756).

The principle which underlies the decisions is well stated by our own court in *Wright v. Defrees*, 8 Ind. 298, where it was said: "The powers of the three departments are not merely equal,—they are exclusive, in respect to the duties assigned to each. They are absolutely independent of each other."

In other cases this principle has been asserted and enforced. *Little v. State*, 90 Ind. 338 (46 Am. R. 224), and cases cited; *Gregory v. State, ex rel.*, 94 Ind. 384 (48 Am. R. 162); *Butler v. State*, 97 Ind. 373.

To stay papers addressed to the presiding officer of one of the branches of the Legislature in the hands of a mere custodian, would be an invasion of this doctrine, and one that might produce a serious conflict between the judicial and legislative departments of the government. In refusing to interfere by injunction, the court neither decides that the papers are of legal force, nor determines what disposition can be legally made of them, for it simply declines to interfere by injunction, because it has no jurisdiction to award such a writ.

The question is one of jurisdiction over the subject-matter, and jurisdiction of the subject-matter comes from the law alone. It is perfectly clear in reason and upon authority, that no man can invest the courts with jurisdiction of the subject-matter. The law alone can do this.

In giving judgment upon a case very like the present in principle, the Supreme Court of Minnesota said: "An executive officer can not surrender the defences which, not for his, but for the public good, the Constitution has placed around

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his office. Still less can his consent authorize this court to transgress the constitutional limitation of its powers, and assume a jurisdiction, which, by the fundamental law, it is forbidden to exercise." *County Treasurer v. Dike*, 20 Minn. 363.

There are well reasoned cases that go so far as to hold that the Legislature itself can not invest the judicial department of the government with authority to assume jurisdiction over the legislative or executive departments. *Sterling v. Drake*, 29 Ohio St. 457 (23 Am. R. 762); *State v. Nichols*, 26 Ark. 74 (7 Am. R. 600); *State v. Sloss*, 25 Mo. 291; *Attorney General v. Brown*, 1 Wis. 513; *Haley v. Clark*, 26 Ala. 439.

This is, indeed, the principle asserted in *Butler v. State*, *supra*, where it was held that the Legislature could not confer upon the courts the authority to pardon or reprieve persons convicted of crime, as that power is conferred upon the Governor by the Constitution of the State.

It is a rudimentary principle, acted upon again and again, that when it is ascertained that there is no jurisdiction, courts will go no further. It would not only be a vain and fruitless thing to assume to decide a question when there is no jurisdiction, but it would be a mischievous thing, because it would give an appearance of authority to that which is utterly destitute of force. Such a decision would be the merest shadow of authority, binding nobody. *People v. Walter*, 68 N. Y. 403, see p. 411; *Weeden v. Town Council*, 9 R. I. 128.

It is laid up among the earliest principles of the law, that a decision, where there is no jurisdiction, is absolutely and incurably void. This principle frequently finds expression, although not always accurately or elegantly, in the statement, so often found in the books, that "such a judgment is *coram non judice* and void." But one result can here be reached, either on principle or authority, and that is, that the courts have no jurisdiction to entertain this suit.

Judgment affirmed.

Filed Jan. 4, 1887.

 Adams v. Davis.

No. 12,660.

ADAMS v. DAVIS.

109	10
135	544
109	10
141	948

109	10
159	362

109	10
180	378

109	10
1169	644

TAXES.—*Repeal of Law.*—*Collection of Prior Taxes.*—*Act of 1872.*—The collection of taxes assessed under the law in force prior to 1872 was not affected by the repeal of that law by the act of 1872.

SAME.—*Act of 1881.*—All taxes existing at the time the act of 1881 was passed were expressly preserved by that act, and were not affected by the repeal of prior laws.

SAME.—*Presumption of Legality.*—It will be presumed, as provided by statute, that all taxes assessed upon property in this State were legally assessed, until the contrary is affirmatively shown. Section 6498, R. S. 1881.

SAME.—*Lien Perpetual.*—*Dropping from Duplicate.*—*Reinstatement.*—The lien for taxes is perpetual until payment, and is not destroyed by the taxes being dropped from the duplicates for some intervening years and placed for those years upon a "register of doubtful taxes."

SAME.—*Presumption that Taxes were Placed on Duplicate by Proper Officer.*—It will be presumed, in the absence of any showing to the contrary, that specified taxes were placed upon the duplicate in the treasurer's hands by the county auditor, whose duty it is to do so.

SAME.—*Delinquent.*—*Distress and Sale.*—*Replevin.*—*Legality of Assessment.*—*County Treasurer.*—In an action against a county treasurer to replevin property distrained by him for delinquent taxes, if the duplicate in his hands is legal on its face, it is not necessary for him to show a legal assessment of the taxes.

SAME.—*Authority of Treasurer to Collect.*—Under the act of 1881, the county treasurer, by virtue of the duplicates placed in his hands by the county auditor, has authority to collect delinquent taxes by distress and sale of personal property, at any time, whether before or after the April settlement, whether the list provided for by section 6427 has been made or not, and whether the delinquent taxes are charged upon the current duplicate or not.

SAME.—*When Replevin will not Lie.*—Replevin will not lie to recover possession of property taken for a tax assessment.

EVIDENCE.—*Receipt.*—*Contradiction by Parol.*—A receipt may be explained or contradicted by parol.

SUPREME COURT.—*Agreement.*—*Interpretation by Parties in Trial Court.*—*Theory of Case.*—Upon an appeal to the Supreme Court, the parties to an action will be held to the interpretation which they have placed upon an agreement in the trial court, and to the theory upon which the case was tried.

From the Sullivan Circuit Court.

Adams v. Davis.

C. E. Barrett and W. E. Barrett, for appellant.

J. C. Briggs, J. T. Hays, W. C. Hultz and H. J. Hays, for appellee.

ZOLLARS, J.—This is an action of replevin, instituted by appellant, to recover the possession of a horse held by appellee as treasurer of Sullivan county. The treasurer claims the right to hold the possession of, and to sell the horse, under a levy made by him, to make the amount of a tax assessed against appellant in 1866, and which, by reason of non-payment, has become delinquent.

At the request of the parties, the trial court made a special finding of facts. To the conclusion of law upon those facts, appellant excepted, and also filed a motion for a new trial.

We are met at the threshold with appellant's contention that the tax laws of 1872 and 1881, respectively, repealed all former tax laws, and that, hence, the taxes in question, for the satisfaction of which the horse was taken, having been assessed prior to 1872, had, and have, no legal existence.

In the case of *Gorley v. Sewell*, 77 Ind. 316, it was held, that taxes assessed under laws prior to the act of 1872, were preserved by, and might be collected under, the provisions of that act. That case has been since cited and approved. *McWhinney v. City of Indianapolis*, 101 Ind. 150. Following those cases, which we regard as having been correctly decided, it must be held, that if the taxes in question were properly assessed against appellant under the laws then in force, they were not swept away, but left, and kept intact by the tax law of 1872, and could have been collected under the provisions of that law, unless there was some obstacle in the way, other than the repeal of former laws by that act.

All taxes existing at the time the act of 1881 was passed, were expressly preserved by that act. R. S. 1881, section 6521. And, according to the above cases, such taxes are to be collected in the manner by that act provided.

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Counsel have discussed a multiplicity of questions involving a proper construction of our complicated revenue laws, the two most important of which, as affecting this case, are :

First. Was there a legal tax assessed against appellant? and, *Second.* Did the treasurer levy upon the horse by virtue of legal authority? These in their order.

Upon the question of the delinquent taxes charged against appellant, the special finding of facts is as follows :

"Second. In 1868 there were, upon the tax duplicate of Sullivan county, delinquent taxes against appellant in the sum of \$37.15.

"Third. In February, 1866, appellant moved from this State to the State of Illinois.

"Fourth. The delinquent taxes, so upon the duplicate of 1868, were dropped from the current duplicate for succeeding years, and were placed upon a book which the county treasurer called 'Insolvent Record,' and so remained until 1884, when they were placed upon the current duplicate for that year. * * *

"Seventh. In 1872 appellant again became, and has since been, a resident of Sullivan county, and his name has been upon the duplicate as a taxpayer."

The evidence shows that the proper assessor assessed appellant's personal property for the year 1866; that upon the duplicate of 1867, the taxes appeared as delinquent; that that delinquency was carried to, and placed upon, the delinquent list of Sullivan county for the year 1869, returned by the county treasurer after the third Monday of April, 1870; that the delinquency was also placed upon "a register of insolvent and doubtful taxes, discontinued on duplicate Turman township, Sullivan county, for the year 1869;" and that the said taxes were placed upon the tax duplicate for the year 1884 as delinquent.

As found by the court, appellant left the State in February, 1866, but that did not affect the assessment of his property for that year. As the law then was, it required each person

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to be listed for all the personal estate owned by him on the 1st day of January of the year in which the enlistment was made. 1 G. & H., p. 71, section 13.

It was further provided, that the lien for taxes should attach on the 1st day of January, and be perpetual until payment. 1 G. & H., p. 99, section 112.

Thus it will be seen, that the taxes in question, upon the assessment properly made, appeared upon the several duplicates named, including that of 1884.

It does not appear who placed the taxes upon the duplicate of 1884. As the county auditor had authority to do so (R. S. 1881, section 6421), it should be presumed that it was done by him. *Hazzard v. Heacock*, 39 Ind. 172; *State v. Wenzel*, 77 Ind. 428.

That the taxes were dropped from the current duplicates for some years, and placed upon "a register of doubtful taxes," can make no difference. By all of the tax laws in force at the time the taxes were assessed, and since, taxes ceased to be a lien only with payment. Some of the laws expressly provided that when there was no probability of collection, they might be dropped from the current duplicates. So, dropping them from such duplicates did not destroy them.

The taxes were found upon the duplicates named, including the duplicate of 1884, and the statute provides, that all taxes assessed upon any property in this State, shall be presumed to be legally assessed, until the contrary is affirmatively shown. R. S. 1881, section 6498.

It is contended by appellant, that the taxes appearing upon the duplicate of 1884, were assessed by the county treasurer, and that he had no authority to make such an assessment. Without stopping to inquire as to the authority of the county treasurer in that regard, it is sufficient to say that the record as a whole, aided by the presumptions above stated, makes it very clear, that appellant's contention has no substantial

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ground upon which to rest, and that the taxes were assessed and placed upon the duplicates by proper authority.

Our conclusion is, that the record sufficiently shows that the taxes were legally assessed, and that they still exist as a legal and enforceable charge upon appellant's property.

In a case like this, where the duplicate in the hands of the treasurer is legal on its face, as here, it is not necessary for him to show a legal assessment of the taxes. *Ewing v. Roberson*, 15 Ind. 26; *Noland v. Busby*, 28 Ind. 154; *Hazzard v. Heacock*, *supra*.

As we shall see hereafter, some of the cases hold, that it can not be shown by the plaintiff, in an action of replevin like this, that the taxes were not legally assessed, and do not constitute an enforceable charge.

The second inquiry is, did the treasurer levy upon the horse by virtue of legal authority?

Upon that question the finding of facts is as follows:

"*Fifth*. At the end of the duplicate of 1868, the county auditor attached his certificate, under his hand and seal, as to the correctness of the duplicate, and commanding the treasurer to collect the same.

"*Sixth*. Attached to the duplicate of 1884, there was a like certificate, and both duplicates were delivered to the treasurer at the proper time. * * *

"*Ninth*. On the 19th day of February, 1885, appellee, as county treasurer, issued a receipt in due form, for the above mentioned delinquent taxes of 1866, against appellant, and, without signing his name thereto, gave it to a duly appointed deputy, with instructions to collect said taxes. Appellant having refused to pay, the deputy levied upon the horse, and made the following return upon the receipt: 'By virtue of this receipt, I this day levied on one dark gray horse, taken as the property of Wm. Adams, to satisfy this receipt. C. L. Davis, Treas., by Reed, dept.'"

So far as applicable here, the statutes have all the time required the county auditor, in making the tax duplicates, to

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set down in separate columns the different taxes, and, also, the delinquent taxes for preceding years. 1 G. & H., p. 94, section 78; 1 R. S. 1876, p. 108, section 138; R. S. 1881, section 6418.

The statutes, prior to the act of 1881, very explicitly required the county treasurer to receive from the auditor the duplicates thus made, and to proceed at once to collect the same. Following these requirements, was the following section in the act of 1872, which was similar to the previous act, viz.: "In case any person shall refuse or neglect to pay the tax imposed on him, the county treasurer shall, after the third Monday of April, levy the same, * * * by distress and sale of the goods and chattels of such person," etc. 1 R. S. 1876, p. 111, sections 152, 155. See, also, 1 G. & H., p. 97, sections 93, 96.

Both statutes gave the treasurer authority to collect delinquent taxes by distress and sale of personal property, at any time, whether they were charged upon the current duplicate or not, and as well before as after his settlement for the current year's taxes. 1 R. S. 1876, pp. 111, 112, sections 155, 156; 1 G. & H., p. 98, sections 100, 101.

It has been held, that under those statutes, the tax duplicate in the hands of the treasurer, if legal on its face, was sufficient authority to enable him to seize, hold, and sell personal property in satisfaction of delinquent taxes. *Ewing v. Robeson, supra*; *Noland v. Busby, supra*; *Hazzard v. Heacock, supra*.

The act of 1881 contains no section in the language of the section of the act of 1872 above set out. Occupying a position in the act of 1881, corresponding to that of the section above set out, as to the other sections defining the duties and powers of the county treasurer in the collection of taxes, is the following: "After the third Monday of April, the treasurer shall cause a list to be made of the delinquents, with the amount due from each, and with a separate column headed 'return,' which list shall be certified to be correct by the

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county auditor. He shall then proceed with such list, which, when so certified, shall be a sufficient authority, and have the same force and effect as an execution, and call either in person or by deputy, upon every person named in the duplicate who is delinquent, * * * and he shall make a demand, * * and if the taxes and penalty are not paid on such demand, he shall proceed immediately to levy upon sufficient personal property of such delinquent to pay such taxes, * * * and to sell the same. * * * When he can find no personal property of such delinquent * * * upon which to levy, after diligent search therefor, he shall make, opposite the name of said person on said list in the column marked 'return,' a special return, setting forth the fact that he had made diligent search in the county for personal property of such delinquent, and was unable to find any upon which to levy for the payment of the taxes due thereon; which return shall be *prima facie* evidence of the facts therein recited." R. S. 1881, section 6427.

It is contended by appellant, as we understand the argument of his counsel, that the list provided for by the above section, confers upon the treasurer all the authority he has under the act of 1881, to distrain and sell personal property; that he must have the list with him when he levies upon such property; that he must make a return upon such list; that in this case the treasurer had no such list, and that, therefore, his levy upon, and retention of the horse, were without authority, and illegal, and that such want of authority may be taken advantage of in a case of this character.

In our judgment, a proper construction of the act of 1881 leads to the conclusion, that the treasurer has authority to collect delinquent taxes by seizure and sale of personal property, aside from section 6427, *supra*. In other words, that he has such authority by virtue of the duplicates placed in his hands by the county auditor.

Section 6500 provides, that the county auditor and treasurer shall attend at the office of the auditor, on the third Mon-

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day of April annually ; that the treasurer shall then and there make a settlement with the auditor for the amount of taxes for which the treasurer is to stand charged, as follows: "*First.* The auditor shall, in a column or columns for the purpose, opposite the name and description, on the right hand of the duplicate in the hands of the auditor and treasurer, extend a list of all such taxes as the treasurer shall have been unable to collect. *Second.* The treasurer, under oath, to be administered by the auditor, shall certify in such duplicate to the correctness of such list, setting out in words and in figures the amount thereof. *Third.* The treasurer shall immediately proceed to collect the same in the manner provided by law."

This section, in connection with section 6427, *supra*, which provides for the making of a list by the treasurer, subsequent to such settlement, without reference to other sections of the statute, leads to an inference that a collection by sale of personal property can be made by virtue of that list alone.

Section 6433 is as follows: "Nothing contained in the preceding section shall prevent the treasurer from collecting delinquent taxes at any time by levy and sale of personal property. Whenever he has reason to believe that any person charged with tax is about to remove from the county without payment of his tax, he may, at any time, levy such tax and charges by distraint and sale of personal property. And it is hereby made his duty to levy and collect all delinquent taxes, whether they be charged upon a current year's duplicate or otherwise, as well before as after his return and settlement for a current year's taxes."

"The preceding section," as used in the section above set out, we think, includes section 6427, because that section is upon the same subject. But, however that may be, the section last above set out clearly gives to the treasurer authority to collect delinquent taxes by the sale of personal property at any time, whether before or after the settlement in April, and without reference to it, whether the list provided for in

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section 6427 has been made or not, and whether the delinquent taxes are charged upon the current duplicate or not. The column headed "return," which the list is to contain, seems to be designed more particularly for the purpose of making and preserving a record of the fact that the treasurer was unable to find personal property after diligent search.

In that regard, the section was doubtless intended to be an improvement upon section 4 of the act of 1873 as amended in 1875. 1 R. S. 1876, p. 140. See, also, section 6428, R. S. 1881.

It is not shown that the treasurer had in his possession the list provided for by section 6427, *supra*, nor is it shown that he had not. If it were necessary, it perhaps ought to be presumed, in a case of this character, that the officers did their whole duty, and that appellee had such a list in his possession, although the deputy did not have it with him when he levied upon the horse.

When we have determined that there was a valid tax, charged upon the duplicates against appellant, which was delinquent, and that, by virtue of those duplicates, the treasurer had authority to levy upon appellant's personal property, it becomes unnecessary to decide as to whether or not the treasurer's proceeding in making the levy was entirely regular, whether he properly made a return of the levy upon the receipt, or as to whether or not the trial court erred in admitting in evidence the receipt and the return thereon. When it is determined that there was such a tax, that the treasurer had such authority to collect by a levy upon, and the sale of personal property, and made such a levy, and took the property into his possession, the finding and judgment must be against appellant's claim to the immediate possession of the property.

The judgment of the court below being correct, and just what it necessarily had to be, it will not be reversed on account of intervening errors, if there were any.

In this case, appellant accompanied his complaint with an

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affidavit, and asked for the immediate possession of the property as against the treasurer. The one and only question was, had appellant the right to such possession?

When the immediate possession of property is sought in an action of replevin, our statute requires that an affidavit shall be made by the plaintiff, or some one in his behalf, showing that the same has not been taken for a tax, assessment, etc. R. S. 1881, section 1267.

When it is shown that it has been taken for a tax, as it is shown here, the plaintiff's case is at an end, and the judgment must be against him. Such is the ruling everywhere.

Citing authorities, Mr. Wells, in his work on Replevin, at section 224, says: "There is a provision common to the laws of all the States, that goods seized on legal process issued for the collection of a tax can not be retaken from the officer by a writ of replevin. * * * The law therefore forbids replevin of goods so seized, and remits the party to his action for trespass or trover, or such other proper action as he may elect."

Justice BREESE, in the case of *McClaghry v. Cratzenberg*, 39 Ill. 117, 122, said: "Disastrous, indeed, would be the consequences to the public was it allowed to every taxable inhabitant, who may have conceived a notion that a law of general application, imposing taxes, is void, and, therefore, he shall be permitted to arrest its operation, and thus break down the financial system of the State. If one may do it, the whole community may, and ruin and disgrace would inevitably follow the extinction of our State credit thus brought about. The law forbids the consideration of the question of the legality of a tax, assessment or fine, levied under any law standing on the statute book of the State, by means of the action of replevin, and for the reason we have given."

And so, it has been held, that replevin will not lie for property taken by virtue of a warrant for the collection of a tax, even though the warrant may have issued erroneously or irregularly, or contrary to law; that if, on its face, it gives the of-

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ficer authority to collect a tax, and to seize property for that purpose, replevin for property so seized can not be sustained. Wells Replevin, section 225; *People v. Albany C. P.*, 7 Wend. 485; *Hudler v. Golden*, 36 N. Y. 446; *Mount Carbon Coal, etc., Co. v. Andrews*, 53 Ill. 177; *Willard v. Kimball* 10 Allen, 211; *Morris Replevin*, p. 93; *Bringham v. Pollard*, 6 Ind. 452.

Some of the above cited cases announce a doctrine more radical than we need here declare, or fully endorse. Most of them were based upon statutes, similar to that in force in this State at the time the case of *Bringham v. Pollard*, *supra*, was decided, which forbid the issuing of a writ of replevin to recover property taken for a tax. Our statute has been changed, and now an action of replevin may be prosecuted without asking for the immediate possession of the property, and, hence, without filing the bond and affidavit required when such immediate possession is asked. *Catterlin v. Mitchell*, 27 Ind. 298; *Hodson v. Warner*, 60 Ind. 214.

That change in the statute, however, does not change the rule which controls in the replevying of personal property taken for a tax. Replevin, under our statute, is a possessory action, and the question in such a case is, was the plaintiff entitled to the possession of the property at the time the action was commenced?

In order to get the immediate possession of the property, the plaintiff must file an affidavit showing that it was not taken for a tax. And so, in order to a final recovery, the plaintiff must show that he was entitled to the possession of the property at the time the action was commenced, and to show this, it must be made to appear that it was not taken for a tax. This construction of the statute is fully sustained by the case of *Ewing v. Robeson*, *supra*, and the recent case of *Louisville, etc., R. W. Co. v. Payne*, 103 Ind. 183.

The statute under consideration provides, that in order that the plaintiff may have the immediate possession of the property, his affidavit shall also contain a statement that it

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has not been seized under an execution or attachment against his property.

In the case last above, which was an action of replevin, it was said: "Under the provisions of our code, the execution defendant can not maintain such an action as this for the recovery of the personal property held under the execution."

Appellant further contends, that it is shown by the proof, that the taxes in question were paid before the levy upon the horse. A receipt was read in evidence which, possibly, is broad enough in its terms to cover those taxes. It is well settled, that a receipt may be explained or contradicted by parol. This was done to the satisfaction of the court below, and the proof is satisfactory here. *Lash v. Rendell*, 72 Ind. 475; *Hight v. Taylor*, 97 Ind. 392; *Scott v. Scott*, 105 Ind. 584.

During the trial an agreement was made by counsel as to the payment of taxes by appellant, which was intended to serve as evidence in the case. That agreement is broad enough in terms, if literally construed, to cover the taxes here in question; but it is manifest from the whole record, that counsel and the court gave it a different interpretation, and tried the case from beginning to end upon the theory that the agreement did not, and was not intended to, cover the tax here in question, and for which the levy was made upon the horse.

Upon an appeal, the parties ought to be held to the interpretation which they put upon the agreement below, and to the theory upon which they tried the case. *Reissner v. Oxley*, 80 Ind. 580; *Graham v. Nowlin*, 54 Ind. 389; *Carver v. Carver*, 97 Ind. 497 (516); *Buchanan v. State, ex rel.*, 106 Ind. 251.

We do not find it necessary to go into the question as to whether or not, in a case of this character, proof of the payment of the taxes for which the property was taken, is competent. It is sufficient here, that the court below found that they had not been paid, and that there is nothing in the record

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that requires, or would justify this court in overthrowing that finding.

Other questions are discussed by counsel, which we do not extend this opinion to decide, as they are not such as could affect the conclusion reached and above stated.

Judgment affirmed, with costs.

Filed Nov. 22, 1886; petition for a rehearing overruled Jan. 5, 1887.

109 22
126 389

No. 11,649.

MALOTT v. PRICE ET AL.

CONTRACT.—*Real Estate.*—*License.*—*Assignment.*—*Notice.*—An agreement, by which a party is to have certain land, “to hold and use as his own as long as he keeps a mill upon it and keeps the same in running order,” is a mere naked license, creating no freehold estate in the land, and an assignee of the instrument is chargeable with notice of the nature of the interest assigned.

SAME.—*Personal Property.*—*Mill.*—*Chattel Mortgage.*—*Innocent Purchaser.*—The mill, by the terms of the agreement, being treated as personal property by the owner of the freehold and his licensee, an assignee of the instrument, notwithstanding the mill is a permanent structure, annexed to the real estate, is bound to know of its liability to be encumbered by chattel mortgage, and can not claim to be an innocent purchaser as against such a mortgage executed thereon by his assignor and properly recorded.

From the Grant Circuit Court.

G. W. Harvey, A. Steele and R. T. St. John, for appellant.
J. F. McDowell and C. L. Henry, for appellees.

MITCHELL, J.—On the 9th day of October, 1874, John Comer and Richard Babb, being the owners of adjoining tracts of land in Grant county, made an agreement with Shock and Clark, the material part of which was in the following terms:

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"The said Comer and Babb agree to let Shock and Clark have two acres of ground on the southeast corner of Richard Babb's land, and out of the southwest corner of John Comer's land, to hold and use as their own as long as they keep the mill upon it, and keep the same in running order."

This agreement was signed by all the parties, but was not acknowledged. On the 22d of January, 1878, Shock and Clark assigned the agreement, by a writing endorsed on the back of the paper, to Jackson Nance. After several intermediate assignments endorsed thereon, the paper was in like manner assigned to the appellant, Millicent Malott, on the 3d day of April, 1879.

It may be inferred that a mill had been erected on the land before the agreement above set out was made. Apart from the inference arising from the language of the agreement above referred to, there is nothing in the record to show when, by whom, or under what arrangement or agreement the mill in controversy was erected.

While Jackson Nance held the agreement above set out, as the assignor of Shock and Clark, he executed a chattel mortgage to Micajah H. Moon, to secure an indebtedness owing by the mortgagor to Moon. The instrument recites that the mortgagor had bargained and sold to Moon "the following described personal property, to wit: The undivided one-half of one grist mill, with three run of burrs—two for wheat and one for corn, stationary boiler and engine combined, also the undivided one-half of a stationary saw mill and saw frame, and all the fixtures thereunto belonging, * * * situate in Franklin township, Grant county, Indiana."

This instrument was duly recorded in the chattel mortgage record of Grant county.

It is conceded that the mill described in the mortgage is the same as that referred to in the agreement above set out.

Price, as the assignee of Moon, commenced this suit to foreclose the mortgage, the appellant being described as a

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defendant, claiming an interest in the mortgaged property. A judgment of foreclosure having been given below, the appellant brings this appeal, and asks a reversal, on the ground that she was an innocent purchaser of the mortgaged property without notice of the mortgage. The argument on her behalf proceeds upon the theory that the agreement between Comer and Babb, on the one part, and Shock and Clark, on the other, created in the latter a freehold estate in the land therein described. It is said the estate thereby created is in the nature of a base or qualified fee, and that the mortgage sought to be foreclosed was therefore an encumbrance upon real estate; hence, it is argued, since it appears from the evidence that the appellant purchased and paid for the property, without actual notice of the encumbrance, the chattel mortgage record did not charge her with constructive notice. The case is before us upon a second appeal without substantial difference as to the merits of the questions involved. *Price v. Malott*, 85 Ind. 266.

The agreement referred to contains no words of grant or conveyance of any description whatever. *Hummelman v. Mounts*, 87 Ind. 178. It was in legal effect nothing more than a mere naked license, under which Shock and Clark were authorized to occupy the land of Comer and Babb, so long as they should see fit to keep the mill upon the land, and keep it in running order. *Knight v. Indiana, etc., Co.*, 47 Ind. 105 (17 Am. R. 692); *New York, etc., R. W. Co. v. Randall*, 102 Ind. 453.

Whatever interest or right the appellant acquired, if she acquired any, she took by a mere assignment endorsed on the back of the written memorandum. Freehold estates in land can not be created by an informal memorandum such as that referred to, nor are such estates transferable by merely assigning the deed which creates them.

While the record discloses nothing concerning the agreement under which the mill was erected, the plain inference

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from the writing above set out is, that Shock and Clark had the right to remove it at their discretion. It was, therefore, as between them and the owners of the land, presumably personal property. *Price v. Malott, supra; Rogers v. Cox*, 96 Ind. 157 (49 Am. R. 152), and cases cited.

The appellant's interest in the property having accrued to her under and by an assignment of the agreement in question, her interest can not be greater in extent than was that of her assignor. Having taken an assignment of an instrument which could not with propriety be regarded as a conveyance of real estate, and which was only assignable on the assumption that it related to a chattel interest, she is chargeable with notice of the nature and quality of the interest assigned. The very instrument through which she claims recognizes the right of her assignor to treat the mill as personalty, and remove it from the land. She was, therefore, bound to know that the mortgaged property was subject to all the incidents of property of that description, one of which is the liability of being encumbered by chattel mortgage.

That the mill was a permanent structure, and annexed to the real estate, does not affect the question in a case like this. As we have seen, by the terms of the instrument under which the appellant claims as assignee, the mill was treated as personal property by the owners of the freehold, and their licensees. The appellant's assignors treated it as personalty, and mortgaged it as such.

The instruction given by the court, to the effect that if the owners treated the property mortgaged as personal property, and mortgaged it as such, the mortgage was properly recorded as against the appellant, was therefore not erroneous.

What has been said disposes necessarily of the other questions argued. The appellant's position can not be assimilated to that of an innocent purchaser of land, upon which trade fixtures have been erected, and permanently annexed to the soil, the purchaser being ignorant of a binding agreement

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authorizing the fixtures to be severed. It was agreed that the mortgage was duly recorded in the chattel mortgage record.

The judgment is affirmed, with costs.

Filed Jan. 7, 1887.

No. 13,364.

DUNCAN v. SHENK.

109	26
130	509
109	28
153	448

ELECTIONS.—*Laws to be Liberally Construed.*—Election laws are to be liberally construed when necessary to reach a correct result, and their provisions treated as directory rather than as mandatory.

SAME.—*Change of Precincts.*—*Statute Construed.*—Section 4687, R. S. 1881, prohibiting a change in the boundaries of election precincts by the county commissioners after the June term of the board next preceding any election, does not apply where the readjustment of a precinct becomes necessary on account of a change in the boundary line between townships.

SAME.—*Change of Township Boundary.*—*Right to Vote.*—Where the boundary line of a township is changed by the county commissioners, at their December term next preceding the April election, by the addition of territory taken from an adjoining township, the persons residing upon such territory, being otherwise legal voters, are entitled to vote at such election in the precinct into which they have been cast.

From the Howard Circuit Court.

M. Bell, W. C. Purdum and C. N. Pollard, for appellant.

J. O'Brien, C. C. Shirley, J. C. Blackledge, W. E. Blackledge and B. C. H. Moon, for appellee.

NIBLACK, J.—This was a proceeding before the board of commissioners of the county of Howard to contest the validity of the election of a township trustee.

John E. Duncan, the contestor, claiming to be a competent elector, and entitled to vote at an election for township

Duncan v. Shenk.

trustee, complained that at the June term, 1884, of the said board of commissioners of the county of Howard, said board established two precincts, known as No. 1 and No. 2 respectively, in the township of Taylor, in said county, giving the boundaries of each of such precincts; that, on the 16th day of December, 1885, said board, by an order entered for that purpose, unlawfully assumed to change the boundaries of said precincts, specifically describing such boundaries as so changed, by which it was made to appear that the second precinct had been enlarged by the inclusion of territory not originally embraced in either one of such precincts; that, on the 5th day of April, 1886, an election was held in said township of Taylor for the purpose, amongst other things, of electing a trustee for that township; that he, the contestor, was a candidate for said office of township trustee, and was voted for as such at both precincts of said township, receiving in all two hundred and two legal votes for that office; that Daniel Shenk, the contestee, was also a candidate at the same election and for the same office, and was likewise voted for at both precincts, receiving therefor only in the aggregate one hundred and eighty-three legal votes; that the whole number of votes cast at said election was four hundred and sixty; that, by reason of the pretended and unlawful changes in the boundaries of the precincts in question, seventy-five illegal votes were cast and counted at said election for township trustee; that of the number of illegal votes so cast and counted, he, the contestor, received twenty-five, and the contestee received the remaining fifty, thus giving him an apparent majority of the votes cast at such election; that upon this apparent majority the contestee was thereafter declared to have been elected trustee of said township of Taylor.

The proceedings had upon this complaint before the board of commissioners resulted in a judgment in favor of the contestee.

Upon an appeal to the circuit court, and after a demurrer

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to the complaint had been overruled, the contestee answered that the only change made in the boundaries of the election precincts referred to in the complaint resulted from a change in the boundary line between the townships of Taylor and Union, of said county of Howard; that, on said 16th day of December, 1885, the board of commissioners of said county of Howard, on the petition of divers persons interested, ordered the boundary line between said townships to be changed by taking a strip of six sections of land from Union township and attaching it to Taylor township; that said strip of land was at the same time, by a like order of said board, added to and made a part of precinct No. 2 of said latter township, of which notice was duly given by publication in a proper newspaper more than one month prior to said 5th day of April, 1886.

This answer was held to be sufficient upon demurrer, and the contestor declining to plead further, final judgment was rendered against him for want of a reply.

Error and cross error are both assigned upon the proceedings below.

The principal question intended to be presented by this appeal, and which we will assume is fairly presented, is, what effect, if any, did the change made in the boundaries and territory of precinct No. 2 have upon the legality of the election held in April, 1886, at which the contestor and contestee were voted for as candidates for township trustee?

The contestor claims that the addition of the six sections of land to precinct No. 2, at the time it was made, was in contravention of the provisions of section 4687, R. S. 1881, and was, for that reason, null and void; that, in consequence, none of the persons residing upon any of the territory so unlawfully added to precinct No. 2 were entitled to vote in such precinct; that seventy-five of the votes given at the election in question were cast by persons residing upon such unlawfully added territory, and that hence such seventy-five votes were illegal votes.

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Section 4687, R. S. 1881, referred to, provides that "The county commissioners of any county may change the boundaries of any precinct within such county, or divide any precinct into two or more precincts, or consolidate two or more precincts into one, or change any place of holding elections, whenever public convenience or the public good may require it: *Provided*, That no such change, division, or consolidation shall be made after the June term of said commissioners next preceding any election; *And Provided, further*, That no such change, division, or consolidation shall be valid without giving due notice, at least one month before any election, either by publication in the newspaper having the largest circulation in such county, or by posters put up in four of the most public places in each precinct."

This section must be construed in connection with other sections of the statute bearing on the same subject to which it relates.

Section 5987, R. S. 1881, directs that "The board of commissioners in each county in this State may lay off and divide the same into any number of townships that the convenience of the citizens may require, accurately defining the boundaries thereof, and may, from time to time, make such alterations in the number, names, and boundaries of such townships as they may deem proper."

Our election laws were enacted upon the evident theory that every qualified voter of the State is entitled to vote at some precinct or voting place at every election, except when restrained by some provision of our State Constitution.

This is well illustrated by the provisions of section 4686, R. S. 1881, which requires the commissioners of the several counties to designate suitable places for holding elections in each township, and to define precincts, or voting districts, by definite boundaries, and which further provides that where only one place of voting in a township is designated, such township shall constitute a precinct, or voting district, and prescribes other regulations for the convenience of voters.

Duncan v. Shenk.

The fair inference from all the provisions of the election laws having any relation to the subject is, that, primarily, each township constitutes an election precinct, with the power resting in the proper board of commissioners to change the boundaries of such township at any time, and that when a township is divided into two or more election precincts, the precincts are mere subdivisions of such township, intended to embrace, and presumably embracing, all the territory within its limits.

It is also a well recognized principle of statutory construction, that election laws are to be liberally construed when necessary to reach a substantially correct result, and to that end their provisions will, to every reasonable extent, be treated as directory rather than mandatory.

McCrary, on the American Law of Elections, at section 200, states some general principles which ought to be observed in construing the election laws of the several States, and then concludes as follows: "If we keep in view these general principles, and bear in mind that irregularities are generally to be disregarded, unless the statute expressly declares that they shall be fatal to the election, or unless they are such in themselves as to change or render doubtful the result, we shall find no great difficulty in determining each case as it arises under the various statutes of the several States." See, also, *City of Lafayette v. State, ex rel.*, 69 Ind. 218; *West v. Ross*, 53 Mo. 350; *Jones v. State*, 1 Kan. 273; *Gilleland v. Schuyler*, 9 Kan. 569.

Having in view the right of every qualified voter of the State to cast his vote at some designated and appropriate voting place, at every election held in the township or precinct in which he may reside, we feel it to be our duty to hold that the provisions of section 4687, above set out, do not apply to cases like the one before us, in which the readjustment of an election precinct becomes a necessity on account of a change in the boundary line between townships.

Any other construction would enable the boards of com-

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missioners of the several counties of the State to practically disfranchise large bodies of voters, by inadvertently, or otherwise, changing the boundaries of townships at other times than at the June terms of such boards.

The judgment is affirmed, with costs.

Filed Jan. 4, 1887.

100	81
128	360
100	81
144	53

No. 12,789.

THE WINCHESTER WAGON WORKS AND MANUFACTURING
COMPANY v. CARMAN.

SALE.—*By Wholesale to Retail Dealer.*—*Condition that Title Shall Remain in Vendor Until Payment.*—*When Fraudulent and Void.*—Where a manufacturer and wholesale vendor of articles of personal property sells upon credit and delivers a lot of such articles to a retail dealer for the apparent or implied purpose of resale, a condition in the contract of sale, that the title to the property shall remain in the vendor until the purchase-price is paid, is fraudulent and void as against a purchaser from the vendee.

SAME.—*Evidence.*—Testimony that the vendor expected and intended, when the sale was made to the retailer, that the latter should sell the property to the general public as soon as opportunity offered, without awaiting the maturity of notes given therefor, is admissible.

From the Wayne Circuit Court.

T. J. Study, W. A. Thompson, A. O. Marsh and J. W. Thompson, for appellant.

H. U. Johnson and P. J. Freeman, for appellee.

HOWK, J.—This was a suit by the appellant to recover the possession of two wagons, of the value of \$127, of which, as alleged, it was the owner and entitled to the possession; and further it was alleged, that appellee had possession of such wagons without right or title, and unlawfully and wrongfully detained the same from appellant. Wherefore, etc.

The cause was tried by a jury, and a verdict was returned

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for appellee, the defendant below ; and over appellant's motion for a new trial, the court rendered judgment for appellee upon and in accordance with the verdict.

The only error assigned here by the appellant is the overruling of its motion for a new trial.

The facts of this case were substantially as follows: On, and for some time prior to, the 29th day of July, 1884, appellant was and had been engaged in the manufacture of wagons and in the sale thereof at wholesale to retail dealers therein. On, and for some time before, the day last named, one J. B. Stewart was and had been a retail dealer in wagons and other implements, and a customer of the appellant. On the day last named, pursuant to a written contract theretofore entered into, appellant sold and delivered to said J. B. Stewart, at College Corner, Ohio, "a car load of twenty wagons," for the aggregate sum of \$1,287.50, payable in three instalments, evidenced by Stewart's three notes to the appellant, maturing respectively on the 29th day of November, 1884, and on the 29th days of January and March, 1885. It was stipulated in such written agreement, and in each of Stewart's three notes, that the title to the car load of wagons should remain in appellant until such notes were fully paid. The two wagons, which are in controversy in this action, were a part of such car load of wagons so sold and delivered by appellant to J. B. Stewart, and were by him sold and delivered in January, 1885, to one Benjamin Wolverton, who, "several days afterwards," sold them to appellee. In consideration of the sale of the two wagons to him, Wolverton sold and conveyed to said J. B. Stewart 320 acres of land in Reynolds county, Missouri. Afterwards, J. B. Stewart sold and conveyed the same Missouri land to the appellant, with full knowledge on its part that all that Stewart ever gave for such land was the two wagons, of which it now claims to be the owner in this action. Appellant took the conveyance of such land, at the agreed price of \$480, and with Stewart's consent gave him credit for that amount on an old debt, which he

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owed appellant for other wagons sold and delivered by it to him, prior to its sale and delivery as aforesaid of such "car load of twenty wagons." After appellant obtained its deed for such Missouri land, it commenced this suit against appellee to recover the possession of the two wagons which Stewart gave for such land.

At appellee's request, the trial court instructed the jury that if they found the facts of this case to be substantially as we have stated them, "the plaintiff can not recover said two wagons from defendant in this action, even though said Wolverton knew, at the time he traded such land for the two wagons, that the title to such wagons was in plaintiff, and even though plaintiff and said Stewart, at the time plaintiff took a deed of such land to itself, applied the same upon an existing indebtedness of said Stewart to the plaintiff other than the purchase-money for said two wagons."

The trial court refused to instruct the jury, when requested by appellant, as follows :

"If the wagons in controversy were sold by the plaintiff to one J. B. Stewart, on or about the 29th day of July, 1884, upon the express condition that the title to the wagons should remain in plaintiff until the purchase-price, which Stewart agreed to pay for the same, should be paid, and if said Stewart afterwards, without the consent of plaintiff, and without the wagons having been paid for, traded such wagons to one Wolverton for certain land in the State of Missouri, and thereafter said Wolverton traded or sold such wagons to the defendant, without the consent of plaintiff, and without the purchase-price which Stewart agreed to pay plaintiff for said wagons having been paid, the fact that plaintiff accepted a conveyance of such land from said Stewart, but not in satisfaction of nor in payment upon the amount which Stewart agreed to pay plaintiff for said wagons, did not estop nor deprive plaintiff of the right to recover said wagons from the defendant."

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Appellant also requested the court to give the jury another instruction, which was refused; but as it does not differ in substance, or in legal effect, from the instruction last quoted, we need not set out such other instruction in this opinion.

It is claimed by appellant's counsel, that the court below erred both in giving the instruction requested by appellee, and in refusing to give the instructions asked for by appellant; and these alleged errors of law were assigned by it as causes for a new trial, in its motion therefor. These errors of law fairly present for our decision what we regard as the controlling question in this case, namely: Upon the facts shown by the evidence, as we have heretofore stated them, was appellant's conditional sale of the car load of wagons to J. B. Stewart valid and binding, or was the condition fraudulent and void, as against the appellee?

The law seems to be well settled in this State, that where the owner of personal property sells and delivers it to a purchaser, not for the purposes of consumption or resale, at an agreed price payable at a future day, upon the express condition and agreement that the title to such property should remain in the vendor thereof until the purchase-price was fully paid, the vendee of such property, prior to such payment, can neither sell nor encumber the property in such manner as to defeat the title of the original owner and vendor thereof. *Thomas v. Winters*, 12 Ind. 322; *Dunbar v. Rawles*, 28 Ind. 225; *Bradshaw v. Warner*, 54 Ind. 58; *McGirr v. Sell*, 60 Ind. 249; *Domestic S. M. Co. v. Arthurhultz*, 63 Ind. 322; *Payne v. June*, 92 Ind. 252; *Lanman v. McGregor*, 94 Ind 301; *Baals v. Stewart*, *post*, p. 371.

But where, as here, it appears that a manufacturer and wholesale vendor of articles of personal property sells upon credit, and delivers a lot of such articles to a retail dealer therein, for the apparent or implied purpose of resale by such vendee, it is clear, we think, that the doctrine in relation to conditional sales can not apply to or govern such a sale, in a controversy as to such articles between the original

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vendor and the purchasers thereof from the original vendee. For, in such case, the purposes for which the possession of the property was delivered to the original vendee are inconsistent with the continued ownership thereof by the original vendor, and for this reason the condition, upon which the sale and delivery were made, must be deemed fraudulent and void as against purchasers from the original vendee of the property.

In *Devlin v. O'Neill*, 6 Daly, 305, it was held that a sale of goods, to be disposed of by the vendee at retail, can not be conditional, and that an attempt to make it conditional is fraudulent and void as to creditors of the vendee. So, also, in *Ludden v. Hazen*, 31 Barb. 650, it was held by the Supreme Court of New York, that a conditional sale of goods, to be resold by the vendee at retail, was fraudulent as against purchasers and creditors, and that the form of the transaction should be deemed to be colorable, and the title held to have vested absolutely in such vendee. See, also, *Griswold v. Sheldon*, 4 N. Y. 581, 591; Benj. Sales (3d Am. ed.), section 319, note c.

We are of opinion, therefore, that upon the facts shown by the evidence, in the case under consideration, the title to the two wagons in controversy herein must be held, as between the appellant and appellee, to have vested absolutely in said J. B. Stewart, and that, for this reason, the verdict of the jury in appellee's favor was clearly right. In this view of the case, the instruction given by the court at appellee's request, even if it were conceded to be erroneous, would not authorize the reversal of the judgment. This is settled by our decisions. *Toler v. Keiher*, 81 Ind. 383; *Mand v. Trail*, 92 Ind. 521 (47 Am. R. 163); *Daniels v. McGinnis*, 97 Ind. 549; *Perry v. Makemson*, 103 Ind. 300.

It is certain, we think, that the trial court did not err in refusing to give the jury either of the instructions requested by appellant, because neither of these instructions gave the jury the law, as we have heretofore stated it, applicable to the facts of this case as shown by the evidence.

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It is shown by the record that the trial court, over appellant's objections, permitted the appellee to prove by Asahel Stone, appellant's general manager, while testifying as a witness for appellee, in answer to proper questions, "that the plaintiff and its agents expected and intended, when said wagons were sold to said Stewart, that he was going to sell, and should sell, said wagons to the general public at retail, before the maturity of the notes given for the wagons; that it was the expectation of plaintiff and its agents, that said Stewart would sell said wagons immediately to the general public, without awaiting the maturity of these notes, and as fast as opportunity offered." Appellant excepted to the ruling of the trial court, in admitting the evidence quoted, and assigned such ruling as cause for a new trial in its motion therefor.

Appellant's counsel insist in argument that it was error for the trial court to admit the evidence quoted of its general manager, in regard to its intentions and expectations. It is shown by the record that this evidence was objected to below solely on the grounds "that the contract between plaintiff and said Stewart was in writing, and that it was not competent for defendant to change, vary or add to said agreement and contract any terms, conditions or provisions, by parol evidence as to what was said, at the time said agreement and contract was made, as to the expectations or intentions of the plaintiff."

It is very clear, we think, that this objection to the admission of Stone's evidence was not well taken, and was properly overruled, and it is settled by our decisions that objections to the admission of evidence, which were not made below, can not be made here. *Bruker v. Kelsey*, 72 Ind. 51; *McIlwain v. State, ex rel.*, 80 Ind. 69; *Lake Erie, etc., R. W. Co. v. Parker*, 94 Ind. 91.

The record of this cause wholly fails to show that appellee offered to prove by the witness Stone "what was said at the time said agreement and contract was made, as to the ex-

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pectations or intentions of the plaintiff;" or that appellant objected to the admission of such parol evidence, upon any ground; or that the trial court admitted parol evidence of what was said by any one, at the time mentioned or at any other time. Stone's evidence, above quoted, of which appellant complains, did not change or vary the written contract between plaintiff and said Stewart, nor add thereto any terms, conditions or provisions which were not already expressed in such contract, and clearly implied in and by the entire transaction between the appellant and Stewart, as shown by the evidence. We are of opinion, therefore, that Stone's evidence above quoted was not objectionable, either upon the ground stated below or upon any other ground, and that the court committed no error in the admission of such evidence.

Upon the whole case as presented here by the record, it appears to us "that the merits of the cause have been fairly tried and determined in the court below;" and in such a case our statute forbids that "any judgment be stayed or reversed, in whole or in part." Section 658, R. S. 1881.

The judgment is affirmed, with costs.

Filed Jan. 5, 1887.

No. 11,640.

HANLON v. DOHERTY ET AL.

MORTGAGE.—When Deed Is.—Although a deed is absolute on its face, it is only a mortgage if executed to secure an existing debt.

SAME.—Release.—Consideration.—Evidence.—A release may be shown to be without consideration.

SAME.—Equity.—Merger.—Extinguishment.—Deed.—Where the holder of a purchase-money mortgage, after a second mortgage upon the land has been executed to a third person, extends the time of payment of the amount due on his mortgage, and as a security accepts a deed to the land absolute on its face, and subsequently, without consideration and

109	37
124	51
124	119
109	37
130	222
130	308
130	376
109	37
136	95
109	37
137	230
137	688
109	37
140	233
141	237
142	78
109	37
144	162
146	88
146	444

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with no intention of releasing his lien, releases his mortgage of record, such mortgage will be kept alive in order that he may not lose the priority of his lien.

SAME.—*Uniting of Two Estates in Mortgagee.*—*When Mortgage not Merged.*—

Even when the fee in the mortgaged property has been vested in the mortgagee by a conveyance from the mortgagor, and the mortgage has been released, it will still be upheld whenever it is for the interest of the mortgagee, by reason of some intervening title or other cause, that it should not be regarded as merged.

EVIDENCE.—*Privileged Communications.*—*Attorney.*—*Scrivener.*—Communications made to an attorney who is acting for both parties, and which are made in the presence of both, are not privileged, nor are communications made to an attorney acting as a scrivener.

SAME.—*Witness.*—*Action by Executrix.*—In an action by an executrix upon a contract made with her testator by the defendant, the latter is not a competent witness.

SAME.—*Exclusion.*—*Harmless Error.*—The exclusion of competent evidence is a harmless error where the result must have been the same had it been admitted.

From the Floyd Circuit Court.

D. C. Anthony, J. V. Kelso and F. T. Hord, for appellant.
J. H. Stotsenburg and A. Dowling, for appellees.

ELLIOTT, C. J.—The complaint of the appellant is founded on a note executed by John Doherty to him, and the mortgage given to secure it, executed by Doherty and wife on the 8th day of December, 1875. Among others who were made parties to answer as to their interests in the land was Elizabeth Humphreys, executrix of the will of Thomas Humphreys, deceased. She appeared and filed an answer and cross complaint, but we need not further refer to her answer, as the questions made on the pleadings are confined to the cross complaint.

It is a familiar rule of equity, that a deed, although absolute on its face, is nothing more than a mortgage when executed to secure an existing debt. No matter what form the transaction may assume, if it appears that the instrument was executed to secure a subsisting debt, it will be adjudged a mortgage. The controlling element is the existence of the

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debt and the execution of an instrument to secure it. This elementary doctrine disposes of the objection suggested, rather than urged, against the second paragraph of the cross complaint.

The third paragraph of the cross complaint contains these material allegations: That, on the 7th day of July, 1873, Doherty and his wife executed to George Phelps a mortgage on part of the land described in the appellant's complaint, to secure the payment of the purchase-money; that on the following day this mortgage was recorded; that it was subsequently assigned to Thomas Humphreys; that after the assignment of the mortgage, on the 7th day of March, 1878, Doherty entered into an agreement with Humphreys, wherein an extension of time for the payment of the debt secured by the mortgage was granted, and pursuant to the agreement Doherty and wife executed to Humphreys a deed, absolute on its face, to secure the amount due on the purchase-money mortgage; that, after the execution of this deed, Humphreys, without intending to release his lien for the purchase-money, and without having received any consideration, entered a release of the purchase-money mortgage on the records of Floyd county; that appellant's mortgage was not executed for purchase-money, and was not executed until after the purchase-money mortgage was executed and recorded.

The argument of appellant that a release may not be shown to have been executed without consideration can not prevail. A release, like any other contract, may be shown to lack the essential element of consideration.

The difficult question is as to the effect of the transaction of March 7th, 1878, upon the rights of the appellant under his mortgage executed in December, 1875. The mortgage executed to Phelps in July, 1873, was for the purchase-money of the land, and, both in equity and in priority of time, was the superior lien. If the transaction of March, 1878, did not destroy this superiority, it must prevail over the lien of the appellant's mortgage. If the appellant had taken his

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mortgage upon the faith of the release entered of record, we think his rights would be paramount; but this he did not do, for he accepted his mortgage in 1875, when the record showed the purchase-money mortgage to be in full force. No injustice is, therefore, done him by continuing the lien of that mortgage. He is not prejudiced by continuing that lien in force, for he had constructive notice when he took his mortgage, that it was subordinate to the mortgage executed for the purchase-money. The holder of the purchase-money mortgage, on the other hand, would lose the priority of his lien if it should be held that his mortgage was extinguished by the transaction of March, 1878. We think it the duty of the court to avert this unjust result, and we have no doubt that it can be done by the application of the familiar rule of equity that courts will keep alive an encumbrance when equity requires it, and it was not the intention of the parties that the encumbrance should be extinguished. The rule of which we are speaking was thus stated in *Lowrey v. Byers*, 80 Ind. 443: "It is an elementary rule that equity will consider an encumbrance as in force if the ends of justice can be thereby attained."

In another case it was said: "When a new mortgage is substituted in ignorance of an intervening lien, the mortgage released through mistake may be restored in equity, and given its original priority as a lien, where the rights of innocent third parties will not be affected." *Sidener v. Pavey*, 77 Ind. 241, see p. 246.

Mr. Pomeroy, in speaking of a lien that will be kept alive, says: "If there is no reason for keeping it alive, then equity will, in the absence of any declaration of his intention, destroy it; but if there is any reason for keeping it alive, such as the existence of another encumbrance, equity will not destroy it." Pomeroy Eq. Juris., section 791. This general principle has very often been recognized and enforced by this court. *Howe v. Woodruff*, 12 Ind. 214; *Troost v. Davis*, 31 Ind. 34; *Smith v. Ostermeyer*, 68 Ind. 432; *Haggerty v.*

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Byrne, 75 Ind. 499; *Hewitt v. Powers*, 84 Ind. 295; *McClain v. Sullivan*, 85 Ind. 174; *Elston v. Castor*, 101 Ind. 426 (51 Am. R. 754), see p. 443. In the case before us we have both the equity and the intention existing in favor of the appellee.

The case of *Harris v. Boone*, 69 Ind. 300, cited by the appellant, is strongly against him upon the point that a release executed without consideration is ineffective, nor does it decide that a release without consideration is only invalid as between the parties. We suppose that if the appellant had in good faith acquired rights upon the faith of the release, then the fact that it was without consideration would not defeat those rights; but here the appellant did not act upon the release at all.

The case of *Millspaugh v. McBride*, 7 Paige, 509, is only relevant to this controversy for the reason that it declares the general doctrine that equity will keep an encumbrance alive to subserve the purposes of justice. It does not, even by the remotest implication, sustain the position of counsel, that as no notice was given to appellant of the transaction of March 7th, 1878, his lien became the paramount one.

The appellant offered to prove by Mr. James V. Kelso, that at the time he was called upon by Thomas Humphreys and John Doherty to draw the deed executed by Doherty and wife to Humphreys, it was agreed that the deed should be absolute for the property in controversy; that Humphreys said that he intended to resell the property; that both Humphreys and Doherty were present and assented to the arrangement; "that the papers were drawn according to their instructions, and the deed and bond were executed independent of each other."

Before the offer was made Mr. Kelso testified as follows:

"On the 20th day of April, when I took the acknowledgment of the chattel mortgage, I was an attorney at law, actively engaged in the practice of law, and had been for several years, having my office in the Hedden building. I was

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at the time acting in reference to that paper, as agent, so far as writing mortgage, for one, or I presume both of the parties. I had nothing more to do with it, than writing the mortgage, and wrote what they agreed upon. The understanding was that the mortgage was to secure rent of the place Doherty had conveyed to Humphreys. The deed from Doherty and wife was made in my office in the Hedden building. When it was written Mr. Doherty and Mr. Humphreys only were present. I took the acknowledgment. I think Humphreys came in first; then Doherty came, but I am not certain who came in first. I was acting simply as a notary public then. I had done no business for Mr. Humphreys before. I may have attended to some business for Mr. Doherty, but I do not remember now of having done so. Doherty signed the deed at my office, and then we went down to his home and his wife signed it, and it was then handed to Mr. Humphreys. The whole transaction was closed in my office. The title bond was drawn by me the same day the deed was made. I am not sure, but I think I drew the deed first and the bond afterwards. I went with Doherty to his house to have the deed executed by his wife. I think I prepared both papers before I went to Doherty's. We met again at my office after dinner, and then the bond was signed. I wrote both papers under the instructions of Mr. Humphreys. He paid me for both of them I think, but I am not certain. Mr. Humphreys never gave me any employment as an attorney. He told me what he wanted done. They talked to me fully about the matter. I was a friend to Mr. Hanlon, but not his attorney. I had sued both him and Doherty before that. I had not been the attorney for Doherty. I wrote the papers with the best skill I had as a lawyer. I was not the attorney of Hanlon, Doherty or Humphreys before that. I think it was the first time Humphreys had ever been in my office. He came and inquired for Doherty, said Doherty was to meet him there for the purpose of making a deed. They both asked my opinion

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as to how to arrange the papers, and the nature of the business was fully explained to me, and I fully understood their business.”

The offered evidence can not be pronounced incompetent on the ground that the communication to the witness was a privileged one. The general rule is, that communications between attorney and client are privileged when they are confidential; but, where both parties are present, the communications can not be regarded as confidential. It is obvious that where both parties are present the general rule can not apply, for the element which gives vitality to the rule does not exist. The authorities are abundant and harmonious upon this question, for it is agreed on every hand that communications made to one who is acting for both parties are competent and can not be considered as privileged. *Weeks v. Argent*, 16 M. & W. 817; *Dunn v. Amos*, 14 Wis. 106; *Mobile, etc., R. W. Co. v. Yeates*, 67 Ala. 164; *Gulick v. Gulick*, 39 N. J. Eq. 516; *Whiting v. Barney*, 30 N. Y. 330; *Hebbard v. Haughian*, 70 N. Y. 54; *Sherman v. Scott*, 27 Hun, 331; 1 Wharton Ev., section 587.

There is another ground upon which the competency of this evidence may be securely placed, and that is this: The capacity in which Mr. Kelso acted was that of scrivener, and not that of an attorney, and the communications to him can not, under the rule declared in *Borum v. Fouts*, 15 Ind. 50, be deemed privileged. It was said in that case: “But such communications, in order to be privileged, must be addressed to an attorney in his professional character of a legal adviser, with a view to legal advice which, as an attorney, it was his duty to give.”

While we regard the exclusion of this evidence, on the ground that the communication to Kelso was a privileged one, as erroneous, still, we think the error a harmless one, for, upon the controlling facts, the result must have been the same had this evidence been admitted. What was said by the parties can not make the transaction other than a mort-

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gage, for, where a debt exists that is not extinguished by the conveyance of the property, the transaction is nothing more than a mortgage. That the pre-existing debt still remained undischarged is evident from the facts and from the written instruments executed by the parties, and Kelso's testimony in no material particular tended to prove the contrary. It was of little importance that Humphreys, in terms, denominated the transaction a sale, for its character is to be determined from its substance, not from the mere name given it by one or both of the parties. The transaction constituted a mortgage, and "once a mortgage always a mortgage."

If we should concede that there was a sale, and certainly Mr. Kelso's testimony tended to prove no more than this, still, the result reached must be the same, for the lien of the first mortgage would not have been merged. This principle is asserted in the cases we have cited, and is thus stated by Mr. Jones: "Even when the parties have undertaken to discharge the mortgage upon the uniting of the estates of the mortgagor and mortgagee in the latter, it will still be upheld as a source of title whenever it is for his interest, by reason of some intervening title or other cause, that it should not be regarded as merged. It is presumed, as matter of law, that the party must have intended to keep on foot his mortgage title, when it was essential to his security against an intervening title, or for other purposes of security; and this presumption applies, although the parties through ignorance of such intervening title, or through inadvertence, have actually discharged the mortgage and cancelled the notes." 1 Jones Mortg., section 873.

Many courts have enforced this equitable principle. *Lowman v. Lowman*, 9 N. E. Rep. 245; *Smith v. Swan*, 29 N. W. Rep. 402; *Edgerton v. Young*, 43 Ill. 464; *Young v. Hill*, 31 N. J. Eq. 429; *Stantons v. Thompson*, 49 N. H. 272; *Hatch v. Kimball*, 16 Maine, 146; *Clift v. White*, 12 N. Y. 519; *Forbes v. Moffatt*, 18 Ves. 384.

In this case, the equities are stronger than in most of the

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cases cited, for here the purchase-money was not paid, the mortgagor conveyed to the mortgagee, and received a written defeasance, but the amount of the debt was not reduced, nor was there any change except in the form of the evidence and the security. It would be a palpable perversion of justice to permit an intervening mortgage to creep in and deprive the holder of the purchase-money mortgage of his lien, and there is no principle of law or equity that will justify such a course.

We think that Doherty was not a competent witness under the provisions of the statute, as the suit was by the executrix upon a contract made with her testator. If, however, it were conceded that he was competent, his testimony could not have affected the result, for, upon the principle of equity stated in discussing Kelso's testimony, the judgment must have been for the appellee, even if Doherty had testified that he sold the property to Humphreys.

In discussing the evidence, the appellant's counsel cite authorities upon the rights of *bona fide* purchasers, but it is unnecessary to consider them in detail, for they have no relevancy here. It is no doubt true that the appellant is entitled to protection, but he is not entitled to protection beyond the priority which his mortgage had at the time it was executed, and that would not make it paramount to the mortgage executed to secure the purchase-money. In giving effect to the lien of the purchase-money mortgage, his lien is not displaced; it remains as it was when he accepted his mortgage. All that is done by the application of the principle which rules this case is not to displace a junior lien, but to preserve the senior one. In permitting, as the principle does, the junior lien to keep its rank and priority, the holder of it gets what he expected, and all he expected, at the time he acquired his lien.

It was not necessary for the appellee to prove that the entry of satisfaction was made by mistake, for merger in such cases as this does not take away the first lien, even though all

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the evidences of the debt were purposely destroyed, but leaves it intact as against intervening mortgages. 1 Jones Mortg., section 773, and cases cited in note.

If the appellant had taken his mortgage after the entry of satisfaction, and on the faith that the senior mortgage had been discharged, then counsel's argument would be valid; but, as applied to the actual case, it is without force. The principle of equity which governs this case is strongly illustrated by the case of *Barnes v. Mott*, 64 N. Y. 397 (21 Am. R. 625), in which it was held, that, even as against sureties, a purchaser of land who had paid off a mortgage in ignorance of a lien held by the sureties, was entitled to have the mortgage reinstated and foreclosed.

The record before us presents a much stronger case for the application of the rule, for here the mortgagee was in one instant the holder of the mortgage lien, and in the next the owner of the fee, and there was no interval in which a junior lien could have crept in, so as to displace his superior equity. It would be as unnatural as unjust to presume that Humphreys took an absolute title at the expense of his lien for the purchase-money; while, on the other hand, it is the most natural and reasonable of presumptions that he did not intend to lose the priority secured to him by his purchase-money mortgage. This is a reasonable presumption, and it is a just one, for it produces an equitable result that must commend itself to the approval of conscientious men.

Judgment affirmed.

Howk, J., was not present when this case was considered.

Filed Jan. 7, 1887.

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No. 12,304.

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109	47
145	134
147	62
147	179

JUDGMENT.—*Avoiding Payment.*—*Fraud.*—*Imprisonment.*—Section 22 of article 1 of the Constitution authorizes imprisonment for fraud practiced in avoiding the payment of judgment debts.

109	47
161	442

SAME.—*Execution Against Body.*—*Affidavit.*—Before an execution against the body of a debtor can be issued for fraud in avoiding the payment of a judgment, it must be made to appear by the affidavit or verified complaint, that the amount due upon the judgment can not be collected by an ordinary execution against the property of the debtor.

109	47
171	107

SAME.—*Civil Action.*—A proceeding supplemental to execution, and a proceeding to procure an execution against the body of a debtor, are civil actions within the meaning of the civil code.

SAME.—*Former Adjudication.*—*Estoppel.*—A judgment in favor of the debtor in a proceeding supplemental to execution, although it is erroneous, is a bar to a subsequent proceeding for an execution against his body, where the questions of fact and the object sought in the two cases are the same.

SAME.—*Form of Actions.*—It is not necessary to an estoppel by judgment that the former action was the same in form as that in which the adjudication is pleaded.

SAME.—*Cause of Action.*—*When the Same.*—The right of the plaintiff, and the obligation, duty or wrong of the defendant, constitute the cause of action, and the cause of action is the same where the same evidence will support both actions.

SAME.—*Money in Possession of Debtor.*—*Proceedings Supplemental to Execution.*—Money in the possession of the judgment debtor, which he refuses to surrender in payment of the judgment, may be reached by proceedings supplemental to execution. *Wallace v. Lawyer*, 54 Ind. 501, criticised.

SAME.—*Property.*—*Meaning of Word.*—The word "property," as used in the statute providing for proceedings supplemental to execution, embraces every species of things in which there may be an ownership and which may be made available in the payment of judgments, including money.

From the Hamilton Circuit Court.

F. M. Trissal, *A. F. Shirts*, *G. Shirts* and *W. R. Fertig*, for appellant.

D. Moss and *R. R. Stephenson*, for appellee.

ZOLLARS, J.—Appellant was the defendant below. The substance of the complaint against him, verified by the relatrix, Clara Mills, is, that in January, 1883, the State, upon

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her relation, recovered judgment against appellant and one Gray; that appellant has fraudulently concealed, removed, conveyed and transferred his property subject to execution, with intent to defraud and delay the relatrix in the collection of the judgment; that he has moneys, rights, credits and effects, with which the judgment might be paid, and which he fraudulently withholds and conceals, with a view to delay and defraud the relatrix. The prayer is for an execution against the body of appellant.

The court below found that he had money with which the judgment might be paid, and ordered a writ for his imprisonment in the county jail until he should surrender the money, or until otherwise discharged by due process of law. From that judgment appellant appealed. As will be observed, appellee sought and procured what in the statute is called an execution against the body of the judgment debtor. A warrant for the proceeding is found in sections 676, 680, 792, *et seq.* R. S. 1881.

Section 22 of article 1 of our Constitution inhibits imprisonment for debt, except in case of fraud. Counsel for appellant submit for consideration the proposition, that the fraud for which, impliedly, under that section of the Constitution, there may be imprisonment for debt, is fraud committed in the transaction out of which the debt or liability arose, and not fraud in refusing to apply money or property in payment of the debt after judgment, or in withholding the same from execution.

Whether or not, under the above section of the Constitution, valid statutes might be enacted providing for an execution against the body of the debtor in cases where he was guilty of fraud in the transaction out of which the debt or liability arose, is a question we need not here decide. In some of the States, such statutes have been enacted and enforced.

It is very clear to us, that the leading purpose, if not the only purpose, of the above section of the Constitution, was

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to authorize imprisonment for fraud practiced in avoiding the payment of judgment debts. McDonald's Treatise (Schroeder's ed.), p. 226.

From the first, our statutes have been enacted and enforced upon this theory. Such are the statutes involved here; the statutes providing for proceedings supplemental to execution, arrest and bail, *ne exeat*, and the statutes authorizing writs of *capias ad satisfaciendum* by justices of the peace.

Many, if not all, of the other States have similar statutes, and have enforced them without question, by the courts, as to their constitutionality.

The complaint here, however, we think, is defective. Section 680 of the statutes, R. S. 1881, provides that no execution against the body shall be issued while an execution against the property remains unreturned. An execution against the body is an extraordinary remedy, and is not to be resorted to if the amount due upon the judgment may be made by an ordinary execution against the property of the judgment debtor. Such was the rule in this State before the adoption of the code, and such is the rule elsewhere. *Gwinn v. Hubbard*, 3 Blackf. 14; *Wendover v. Tucker*, 4 Ind. 381; *Cutler v. Colver*, 3 Cow. 30; *Scott v. Shaw*, 13 Johns. 378; *McDonald v. Wilkie*, 13 Ill. 22.

The purpose of the code is to enforce, and not to overthrow that rule.

It appears from the complaint in this case, that the judgment which appellee is seeking to collect, is against appellant and Joseph R. Gray. There is no averment that an execution had been issued and returned unsatisfied, nor is there any averment that Gray was insolvent. For aught that appears, he may have had an abundance of property in the county out of which the amount due upon the judgment might have been readily made by an ordinary execution. It does not appear from the complaint, that appellant is under any greater obligation to pay the judgment than is Gray, and

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for aught that appears, as between themselves, the greater obligation may be upon the latter. Section 792 of the statutes, which provides for the affidavit or verified complaint in a case like this, should be construed in connection with section 680 upon the same subject. Upon such a construction, and looking to the spirit of the whole act, and the analogies of other similar proceedings, we think that it should be made to appear by the affidavit or verified complaint, that there is a necessity for resorting to such an extraordinary proceeding; in other words, it should be made to appear that the amount due upon the judgment can not be collected by an ordinary execution against the property of the judgment debtor or debtors. *McDonald v. Wilkie, supra.*

It has been uniformly held, that in order to maintain a proceeding supplemental to execution, to reach property and credits of the judgment debtor, in the hands of, and due from, third persons, it must be shown that there is a necessity for the extraordinary proceedings; in other words, that it must be shown that the amount can not be collected from the judgment defendant by an ordinary execution. *Dillman v. Dillman*, 90 Ind. 585; *Earl v. Skiles*, 93 Ind. 178; *Wallace v. Lawyer*, 91 Ind. 128; *Cushman v. Gephart*, 97 Ind. 46; *Mitchell v. Bray*, 106 Ind. 265.

And so, in an action to set aside a fraudulent conveyance, it must be shown that neither of the judgment debtors has property out of which the amount of the judgment can be made. *Baugh v. Boles*, 35 Ind. 524; *Bruker v. Kelsey*, 72 Ind. 51; *Sherman v. Hogland*, 73 Ind. 472; *Adams v. Slate*, 87 Ind. 573.

The construction of our several statutes providing for extraordinary remedies in the collection of judgments, is, that such remedies are not to be resorted to where the judgments can be collected by an ordinary execution. That construction should be given to the statute involved here. Upon such a construction, the affidavit or verified complaint is defective, in that it fails to show that the amount due upon the judg-

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ment could not be collected by an ordinary execution against the property of Gray.

With the statement, simply, that in our judgment, the pleas in abatement are insufficient, we pass to the first paragraph of the plea in bar, which presents the important and vital question in the case.

That plea is in the way of answer to so much of the verified complaint as charges that appellant has moneys, rights, choses in action, credits and effects with which the judgment might be paid, and which he fraudulently withholds and conceals with a view to delay and defraud appellee in the collection of the judgment.

The substance of the plea is, that prior to the commencement of this action, appellee instituted proceedings supplemental to execution against appellants Joseph R. Gray, Elisha Mills and Augustus F. Shirts, in the Hamilton Circuit Court, in which county the defendants were residents; that in the affidavit or verified complaint in that action, it was charged that Mills, the principal judgment debtor, was insolvent, and that neither he nor Gray at any time since the rendition of the judgment had any property subject to execution; that appellant had no real estate or other property that could be reached by execution; that he, as owner, had from two to six thousand dollars in cash, and choses in action in his possession, which could not be more particularly described; that Shirts had in his hands fifteen hundred dollars in money, and choses in action, belonging to appellant, all of which appellant unjustly refused to apply in satisfaction of the judgment; that all of the defendants in that action appeared and answered the verified complaint by a general denial, and that after hearing the evidence, the court found for said defendants and gave them judgment for costs.

It is further alleged in the plea, that the moneys, choses in action, credits and effects, which were described in the verified complaint in that action, and which it was charged appellant had, and fraudulently refused to apply in payment of

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the judgment, are the identical moneys, choses in action, credits and effects described in the verified complaint in this action, and which it is charged he has concealed and withheld, with the fraudulent intent to delay and defraud appellee. It is further alleged, that since the commencement of the supplemental proceedings, appellant has not received or acquired any money or property.

All of the facts thus stated in the plea, the demurrer admits as true. The question then arises, is the adjudication in the proceedings supplemental to execution, conclusive here? Is the plea good as a plea of *res adjudicata*?

This question involves an inquiry, first, as to the nature of the proceeding supplemental to execution. That such a proceeding is a civil action, within the meaning of the code, is settled by the latest decisions of this court. *Burkett v. Holman*, 104 Ind. 6, and cases there cited.

The second inquiry is, what is the nature of the proceeding to procure an execution against the body?

Section 792, R. S. 1881, provides, as an initiatory step, that an affidavit shall be filed.

Section 794 provides for the giving of notice, very much as in an ordinary action.

Section 797 provides for the forming of an issue by the filing of an answer, and for the trial of that issue "by the court or a jury, as in other cases."

The sections following, with section 793, provide for the form and substance of the judgment, and the manner of its execution.

Looking to the whole statute, and applying to it the reasoning in analogous cases, the proceeding therein provided, we think, is clearly a civil action, within the meaning of the code. See *Burkett v. Holman*, *supra*, and cases there cited; *Powell v. Powell*, 104 Ind. 18; *Evans v. Evans*, 105 Ind. 204.

As shown by the plea under consideration, the issue of fact to be tried in the proceeding supplemental to execution, was exactly the same issue presented for trial in the case be-

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fore us. In the former case, it was charged that appellant had money, choses in action, credits and effects, which he unjustly concealed and withheld, and fraudulently refused to apply in payment of the judgment.

Whether or not he was guilty of the charge thus made against him, was the one question to be determined by the court upon the evidence adduced. The same identical charge is made in the case before us. Here, again, the one question for decision by the court was: Was appellant guilty of the charge thus made against him?

There is a difference in the time when these actions were commenced, but it is alleged in the plea, and admitted by the demurrer, that the moneys, credits, etc., which it is here charged appellant is concealing, etc., are the same moneys, etc.; and that he has not, since the former action was commenced, acquired any additional money or property. Thus it will be seen, that the two proceedings are civil actions, within the meaning of the code, and that the questions of fact in the two cases, as presented by the affidavits or verified complaints, were the same.

The same evidence that would sustain the affirmative of the issue in one case would sustain it in the other. We do not know upon what theory the court acted in sustaining the demurrer to the pleas in bar, except as informed by appellant's brief. It is there stated, that the learned judge did not regard the proceeding supplemental to execution as an action at law, or in equity, in such a sense as to admit of a final judgment being rendered, so as to become a bar to another proceeding for the same thing. As we have already seen, that proceeding is a civil action under the code, and we think it beyond question, that a final judgment in such a proceeding is a bar to another and subsequent proceeding for the same thing; in other words, that when an issue, such as was tendered by the affidavit or verified complaint in that case is once tried, and judgment rendered, neither party can again be vexed with a re-trial of the same issue. See *Dubois*

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v. *Johnson*, 96 Ind. 6. To hold otherwise, would be to open the way to endless litigation. We by no means intend to hold that proceedings supplemental to execution may not be repeated. One such proceeding may fail because the defendant may, at that time, have no property of any kind which he is withholding, and a subsequent proceeding may be instituted and maintained for the recovery of money and property which have been acquired since the commencement of the first proceeding, or, perhaps, which were not involved in the first investigation.

It appears from the second plea in bar, that in the proceeding supplemental to execution, the court made a special finding of the facts, and therein found that appellant had \$3,000 which he unjustly refused to apply in payment of the judgment. Upon the facts so found, the court ruled, as a conclusion of law, that the defendants were entitled to judgment for costs, and rendered judgment accordingly.

Here, again, we are informed by the briefs of counsel, that the conclusion of law, and the judgment, were made and rendered upon the theory that money in the possession of the judgment debtor can not be reached by proceedings supplemental to execution.

The sustaining of the demurrer to the second plea is, perhaps, in this case, a harmless error, but the question as to whether or not money in the possession of the judgment debtor may be reached by a proceeding supplemental to execution, seems to be important here in determining whether or not the judgment in that case is a bar to this proceeding. At one time, after the adoption of the code, it seems to have been questioned whether money and other property of the judgment debtor in his possession, not ordinarily subject to execution, could be reached by a supplemental proceeding. *Brisco v. Askey*, 12 Ind. 666. The query was made in that case, and it was held that the judgment debtor could not be compelled to surrender for sale by the sheriff claims and demands which he held against other persons, and that the

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proper order, in such a case, would be one restraining the judgment debtor from transferring the accounts, etc., and ordering his debtor to pay the amount into court to be applied on the judgment. That portion of the holding in the case has been subsequently followed. *Chandler v. Caldwell*, 17 Ind. 256. In the case last cited, the holding was put upon the ground that to require such choses in action to be surrendered for sale by the sheriff, would result in a ruinous sacrifice.

So far as we have been able to ascertain from a somewhat careful examination of the reported decisions of this court, the above are the only adjudications upon the exact question there decided.

It has been uniformly held, however, that choses in action may be reached in a proceeding supplemental to execution, by an order upon persons indebted to the judgment debtor to pay the amount of their indebtedness to him into court, to be applied upon the judgment. The above cases so hold. See *Dunning v. Rogers*, 69 Ind. 272; *Butler v. Jaffray*, 12 Ind. 504; *Devan v. Ellis*, 29 Ind. 72; *Keightley v. Walls*, 27 Ind. 384; *Graydon v. Barlow*, 15 Ind. 197; *Cooke v. Ross*, 22 Ind. 157; *Tompkins v. Floyd Co. Agr., etc., Ass'n*, 19 Ind. 197; *Hoadley v. Caywood*, 40 Ind. 239.

And so, it has been uniformly held, that money of the judgment debtor in the hands of third persons may be reached by a proceeding supplemental to execution. *Sherman v. Carvill*, 73 Ind. 126; *O'Brien v. Flanders*, 58 Ind. 22; *O'Brien v. Flanders*, 41 Ind. 486; *Terry v. Deitz*, 49 Ind. 293; *Brookville Nat'l Bank v. Deitz*, 49 Ind. 598; *Earl v. Skiles*, 93 Ind. 178.

These holdings are important here to the extent only that they show that by a proceeding supplemental to execution, money and property may be reached that could not be reached by an ordinary execution, unless voluntarily surrendered.

If money and choses in action of the judgment debtor may be thus reached in the hands of, and due from third persons,

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there is no good reason why money in the possession of the judgment debtor may not be reached by a like proceeding.

We learn from counsel's briefs, that the court, in holding that money in the possession of appellant could not be reached by the supplemental proceeding, rested its decision upon the case of *Wallace v. Lawyer*, 54 Ind. 501 (507) (23 Am. R. 661).

The controlling questions in that case were, whether a municipal corporation could be required to answer as to its indebtedness to the execution debtor, and whether its indebtedness to him could be reached by a proceeding supplemental to execution.

Both questions were decided in the negative, and in referring to an Ohio case, where the contrary was held, and in distinguishing between the statutes of that State and of this, it was said: "There is another plain difference between the two statutes. The Ohio statute subjects 'any claim or chose in action,' and 'all money,' to such payment; while the Indiana statute reaches only the 'property of the judgment debtor, not exempt from execution.'" What was thus said, must be limited to the case before the court. As a general statement as to what property may be reached by a proceeding supplemental to execution, and regarding "property not exempt from execution" as meaning property that might be levied upon without being voluntarily turned out, the statement quoted is not a correct interpretation of our statute.

As we have seen, money of the judgment debtor, in the hands of third persons, may be reached by a proceeding supplemental to execution, and yet it could not be reached by an ordinary execution against the wishes of the owner having it in his possession, or in the possession of others.

To regard the statement quoted from the opinion as an interpretation of our statute, to be applied in all cases, would be to place the case in irreconcilable conflict with the other cases. In the case of *Fowler v. Griffin*, 83 Ind. 297, it was contended by counsel, that money in the hands of a third

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person could not be reached by a proceeding supplemental to execution, and in support of that contention they cited the case of *Wallace v. Lawyer, supra*. In answer to that contention, it was said: "In support of the third objection, counsel has cited * * * *Wallace v. Lawyer*, 54 Ind. 501, to the point that only *property*, but not *money, claims, or choses in action*, of the judgment debtor, can be reached by the proceedings. * * * And there are numerous cases which either expressly or by implication decide that money and *choses in action* of the judgment debtor, in the hands of third parties, may be reached by means of this proceeding." This last case, as subsequent cases, amounts to an overruling of the case of *Wallace v. Lawyer, supra*, if the opinion in that case is to be given the broad construction which it is claimed the court below gave it.

The question yet remains, may money of the judgment debtor in his possession, and which he refuses to surrender in payment of the judgment, be reached by a proceeding supplemental to execution?

Section 815, R. S. 1881, in relation to proceedings supplemental to execution, provides that upon the return of an execution unsatisfied, the judgment plaintiff may have the judgment debtor summoned before the court to answer concerning his property within the county to which the execution was issued.

Section 816 provides that after the issuing of execution, upon an affidavit that the judgment debtor has property (describing it), which he unjustly refuses to apply towards the satisfaction of the judgment, the court may order him to appear and answer concerning the same, and that proceedings may thereafter be had for an application of the property, in satisfaction of the judgment, etc.

Section 819 provides for summoning third persons to answer as to any property of the judgment debtor they may have in their possession, and as to their indebtedness to him.

Section 821 provides that upon the hearing, the judge of

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the court may order the property of the judgment debtor not exempt from execution, in the hands either of himself or any other person, or any debt due to the judgment debtor, to be applied to the satisfaction of the judgment, forbid transfers of property and choses in action, and that the judge shall have power to enforce all orders and decrees in the premises by attachment or otherwise.

It will be observed, that in all these sections, the word "property" is used, and not the word "money."

Property is the word used in section 819, which relates to third persons, and yet it has been held, as we have seen, that the money of the judgment debtor, in the hands of such third persons, may be reached by the proceeding. The word "property," as used in that section, has thus been given a meaning broad enough to include money. And if it has that meaning in that section, there is no reason why it should not have the same meaning in the other sections, especially in section 816.

In another section of the same act, R. S. 1881, sec. 817, the word "money" is used, and it is provided that when the judgment plaintiff shall, at the time of applying for the order, or at any time thereafter, make and file his affidavit that there is danger of the judgment debtor leaving the State, or concealing himself, and that there is reason to believe that he has property, rights, credits, *moneys* and effects, which he unjustly refuses to apply in satisfaction of the judgment, with intent to defraud the creditor, the court shall issue to the sheriff an order of arrest and bail. It would not only be folly, but a gross violation of rights, to arrest and hold a party about to leave the State with money, if that money can not be reached by the final order to be made in the proceeding.

The word "property," as it occurs in the act, is manifestly used in the broad sense of including every species of things in which there may be an ownership, and which may be made available in the payment of judgments. Money may be levied upon under an ordinary execution, if turned out by the

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owner, but not if he keeps it in his pocket and refuses to surrender it.

The proceeding supplemental to execution, in our judgment, was intended, not only to discover property, but to reach money and other property which the judgment debtor refuses to apply in payment of the judgment, and which can not be reached by an ordinary execution.

We do not now recollect that there has been any direct adjudication upon this question by this court, but there are reported cases which show that in such proceedings, judgment debtors have been ordered to pay over money, to be applied upon the judgment, and that such orders have been at least impliedly sanctioned as correct.

It results from what we have said, that in the supplemental proceedings mentioned in the plea, the court had authority to order appellant to pay into court any money which it was found he had and refused to apply in payment of the judgment, and to enforce that order by attachment and imprisonment.

If, as stated in the second plea, the court found that appellant had money which he unjustly withheld, it made a mistake as to the law in rendering judgment against appellee for costs.

There should have been an order upon appellant to pay the money into court, and an enforcement of that order by attachment and imprisonment if necessary.

If the judgment in such a proceeding is a bar to a proceeding like this, it can make no difference what the finding of facts in that case may have been. It is the final judgment, and not the verdict or finding of facts, that constitutes the estoppel. If the conclusions of law upon the facts found were erroneous, the remedy was by an appeal. *Faught v. Faught*, 98 Ind. 470 (472); *Farrar v. Clark*, 97 Ind. 447 (450); *Davenport v. Barnett*, 51 Ind. 329; *Indiana, etc., R. W. Co. v. Koons*, 105 Ind. 507 (512); *Herman Estop. and Res Judicata*, sections 60, 107 and 108.

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As we have said, the issue for trial, presented by the affidavit or verified complaint in the supplemental proceedings, is the same issue presented by the affidavit or verified complaint in this case.

The mode of procedure provided by the statutes in the two cases is very similar, and the manner of enforcing payment is, in substance, the same. Either proceeding may be resorted to for the purpose of reaching money in the hands of the judgment debtor, and in either case, if he does not surrender it when ordered so to do, he may be imprisoned. It is not necessary to an estoppel by judgment, that the former action, in which the issue was adjudicated, shall be the same form of action as that in which the former adjudication is pleaded. Where, as here, the former action was for substantially the same object, and the same matters were in issue, and were determined by final judgment, that judgment will be a bar to the prosecution of the subsequent action. We have many cases in which adjudications have been held to be bars to subsequent actions, although the forms of the actions were different. *Cutler v. Cox*, 2 Blackf. 178; *Campbell v. Cross*, 39 Ind. 155; *Reeves v. Plough*, 46 Ind. 350; *Reid v. Huston*, 55 Ind. 173; *Farrar v. Clark*, *supra*; *Faught v. Faught*, *supra*; *Turner v. Allen*, 66 Ind. 252. See, also, *Roberts v. Heim*, 27 Ala. 678; *Cannon v. Brame*, 45 Ala. 262; *Herman Estop. and Res Judicata*, sections 111, 214; *Stowell v. Chamberlain*, 60 N. Y. 272.

As we have before stated, the same evidence that would have established the charges in the affidavit or verified complaint in the supplemental proceedings, would establish the charges in the affidavit or verified complaint in the case before us. That has been applied as a test to determine whether the cause of action in the two cases is the same, and whether, therefore, an adjudication in one is a bar to the other.

In the case of *Taylor v. Castle*, 42 Cal. 367 (372), it was said: "The cause of action is said to be the same where the same evidence will support both actions; or, rather, the judg-

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ment in the former action will be a bar, provided the evidence necessary to sustain a judgment for the plaintiff in the present action would have authorized a judgment for the plaintiff in the former." See, also, the Indiana cases above cited; Bigelow Estop., p. 37; Herman Estop. and Res Judicata, section 259.

Applying the test above mentioned, the cause of action in the two cases under examination was the same.

That the cause of action in two cases is the same, is another test by which it is determined that an adjudication in one is a bar to the other. Herman Estop. and Res Judicata, sections 106, 107, 111; *Kalisch v. Kalisch*, 9 Wis. 529; *Stowell v. Chamberlain*, *supra*.

In the case of *Veeder v. Baker*, 83 N. Y. 156 (160), it was said: "Jurists have found much difficulty in precisely defining a cause of action. (Pomeroy on Rem., section 452). It may be said to be composed of the right of the plaintiff and the obligation, duty or wrong of the defendant; and these combined, it is sufficiently accurate to say, constitute the cause of action."

Under this definition, which seems to be a reasonable one, the cause of action in the supplemental proceeding and in the case before us is the same. The right of appellee was to have the money in the possession of appellant applied in satisfaction of the judgment. The duty of appellant was to so apply that money, and his wrong was in withholding it and refusing to apply it in payment of the judgment. The cause of action was the same; the evidence necessary to establish appellee's rights in either case was the same; the end to be accomplished by either proceeding was the same, and the method provided for the accomplishment of that end is substantially the same.

Our conclusion upon the whole case is, that the judgment in the proceeding supplemental to execution is a bar to the present action, and that, therefore, the court below erred in sustaining the demurrer to the pleas in bar.

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The judgment is reversed at appellee's costs, and the cause is remanded with instructions to the court below to overrule the demurrer to those pleas and sustain the demurrer to the verified complaint.

Filed Jan. 6, 1887.

 No. 12,696.

PHILLIPS v. LEWIS ET AL.

DRAINAGE.—Judgment.—Pleading.—Where an answer in bar of an action to recover a drainage assessment alleges facts showing that the drainage proceedings were void for non-compliance with the law in force at the time, a reply that the drain was established under a prior act which did not contain the requirements which had been violated, is bad where such act had been repealed before the proceedings were begun.

FORMER ADJUDICATION.—Irregularities.—Estoppel.—Pleading.—Where an answer pleads a former adjudication of the matters in issue, a reply attacking the validity of the judgment in the former action, on the ground of mere irregularities and errors which are not sufficient to render it void, is bad.

SAME.—Presumption of Regularity of Judgment.—Where a former adjudication is pleaded, it will be presumed, in the absence of an affirmative showing to the contrary, that the record of such adjudication is regular and free from error.

From the Grant Circuit Court.

J. Brownlee, for appellant.

A. Steele and *R. T. St. John*, for appellees.

Howk, J.—This was a suit by appellant, and one James Hoggart, against the appellees, to recover the amount claimed to be due upon a certain ditch assessment, alleged to have been made on the 5th day of October, 1868, against certain real estate, in Grant county, then owned by one William L. Noble. Before any steps were taken in the case, the record shows that on motion of plaintiff, James Hoggart, the cause

100	62
134	522
186	306
109	62
148	608
148	600

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as to him was dismissed. Appellees jointly answered, in four paragraphs, and also filed their cross complaint herein. Appellant's demurrer was overruled as to the first and third paragraphs, and sustained as to the second and fourth paragraphs, of appellees' answer to the complaint. Appellant answered appellees' cross complaint, in three paragraphs, and also filed replies to the first and third paragraphs of appellees' answer to his complaint. Appellees' demurrer was sustained to the first and third paragraphs of appellant's answer to their cross complaint; and their demurrer was also sustained to the first and third paragraphs of appellant's reply to the first and third paragraphs of their answer to appellant's complaint. It is then shown by the record, that appellant withdrew the second and fourth paragraphs of his answer to the cross complaint, and also the second and fourth paragraphs of his reply to appellees' answer, "electing to stand by his pleadings notwithstanding the demurrers." The court then adjudged that appellant take nothing by his suit herein, and that appellees recover of him their costs; and from this judgment this appeal is now here prosecuted.

In this court, appellant has assigned a number of errors. But it is manifest, from the foregoing abstract of the record, that the only decisions of the court below, which were adverse to him, were the sustaining of appellees' demurrer to the first and third paragraphs of his reply to appellees' answer to his complaint, and the sustaining of appellees' demurrer to the first and third paragraphs of his answer to their cross complaint. The last of these rulings, even if erroneous, was harmless to the appellant, because, as shown by the record, the appellees failed to recover upon their cross complaint herein. So that the only error assigned by appellant upon the record of this cause, which we are required to consider and decide, is the error of the court in sustaining appellees' demurrer to the first and third paragraphs of his reply to the first and third paragraphs of their answer to his complaint herein. The first paragraph of reply is addressed to the first

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paragraph of answer, and the third paragraph of reply is addressed to third paragraph of answer.

In the first paragraph of their answer, appellees admitted that, in 1868, appellant and James Hoggart petitioned the board of commissioners of Grant county for the drainage of certain lands, named in such petition; that an order was made by such county board granting the prayer of such petition; that such board then pretended to appoint Henry Stugart, Benjamin Glessner and Eli T. Hunt, appraisers to assess the benefits and damages, likely to result to the lands described; that said appraisers pretended to make and return an assessment of such benefits and damages, which assessment was filed with the complaint herein, and that the land in the complaint named was owned by William L. Noble, who was a non-resident of Grant county; and appellees averred that they were the owners of such land and derived their title thereto by and through said William L. Noble, who was their remote grantor; that the aforesaid petition and order of the county board, and all the proceedings thereunder, were and continued to be wholly void, because said petition failed to locate or indicate the course and terminus of the ditch or drain so petitioned for; that the order of the county board to the aforesaid appraisers did not locate or indicate any course or terminus of such ditch or drain. Wherefore appellees said that such proceedings were void, and they denied each and every allegation in the complaint, not admitted in this paragraph of answer, and demanded judgment for costs, etc.

In his reply to the foregoing paragraph of answer, appellant alleged that the ditch, named in his complaint and proceedings, was ordered, allowed and established by the board of commissioners of Grant county, at its September term, 1868, which was so done and ordered according to the provisions of the law, approved March 7th, 1863; and after setting out a description of the beginning, courses, distances and terminus of the ditch or drain, appellant again alleged

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that the ditch or drain was, in all things, done, allowed, located, constructed and the assessments made, in accordance with the provisions of such law of March 7th, 1863; that each and all of the assessments for the construction of such ditch, referred to in his complaint, had been fully paid and satisfied, except the assessment on the land of William L. Noble, which was then the land of appellees who purchased the same, knowing that said assessment had been made and recorded, as stated in the complaint herein; that such ditch benefited their land much more than the amount of such assessment, and that such assessment was unpaid and a valid lien on their land; that William L. Noble knew that the ditch was so located, and that appellant was constructing the same, and made no objection thereto and agreed to pay his assessment therefor, all of which was due appellant, and James Hoggart had no interest therein. Wherefore, etc.

We are of opinion that the court did not err in sustaining appellees' demurrer to the foregoing reply. The paragraph of answer, to which the reply was pleaded, stated in bar of appellant's action the fact that the ditch proceedings, mentioned in the complaint, were wholly void, because neither the petition to, nor order of, the county board located or indicated either the course or terminus of said ditch or drain. The substance of appellant's reply to this defence is, that the ditch proceedings mentioned were had, and the ditch was constructed, under and in accordance with the provisions of the drainage act of March 7th, 1863, which did not in terms require that either the petition, or the order of the county board, should locate or indicate the course or terminus of such ditch.

The difficulty with this reply, and it is one which can not be obviated by any averment, is; that when the ditch proceedings mentioned were instituted, in September, 1868, the drainage act of March 7th, 1863, was no longer in existence; but it had been superseded and repealed, expressly or by impli-

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cation, by the drainage act of March 11th, 1867, which latter act, by force of an emergency declared, took effect and was in force from and after its passage. The titles of the two acts were substantially the same, and the later act certainly covers the whole subject-matter of the older law, and adds new provisions, some of which are inconsistent with those of the older law. *Longlois v. Longlois*, 48 Ind. 60; *Deisner v. Simpson*, 72 Ind. 435; *Wagoner v. State*, 90 Ind. 504. Besides, the act of March 11th, 1867, expressly repealed all laws, or parts of laws, in conflict with any of the provisions of such act.

The act of March 11th, 1867, was in force when appellant's ditch proceedings were begun and had, and was then the only law of this State authorizing any such proceedings. It is certain, we think, that the petition of appellant and Hoggart for the ditch did not conform to the requirements of the act of March 11th, 1867, and was not sufficient to give the board of commissioners of Grant county jurisdiction of the subject-matter of such ditch. It follows, therefore, that all of such ditch proceedings, which were the foundation of appellant's supposed cause of action herein, were absolutely void, and they can not be rendered valid by the averment that they were had under the provisions of a law which had been superseded and repealed eighteen months before they were begun. The demurrer to the foregoing reply was correctly sustained.

In the third paragraph of their answer to the complaint, appellees made the same admissions, and none other, in regard to the ditch proceedings, as they made in the first paragraph of their answer, the substance of which we have heretofore given in this opinion; and they then averred that afterwards, at the fall term, 1870, of the court below, appellant herein and James Hoggart prosecuted an action against William L. Noble, who was then the owner of the land mentioned in the complaint herein, and was the remote grantor of appellees, for the benefits assessed against such land, which

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were the same benefits and demands named and sought to be recovered in this action, and none other; that the aforesaid action was prosecuted to final judgment, and therein William L. Noble recovered a judgment against appellant Phillips and said Hoggart for his costs, and the plaintiffs therein took nothing by their suit, which said judgment remained of record in the proper order-book of said court; and that appellees herein were the remote grantees of William L. Noble, and held said land under his title and from him. Wherefore appellees said that the matters and things in appellant's complaint herein had been and were, in the aforesaid cause, fully adjudicated, and they demanded judgment for costs, etc.

In his reply to the foregoing paragraph of answer, appellant said that the cause referred to, in such answer, was not a final determination of the cause, and was not a bar to his prosecution and recovery in this cause, because he admitted that he so commenced a suit, in the court below, against said Noble, to recover said assessment and pay for so constructing said ditch, to which suit said Noble appeared and answered by general denial; that the cause being at issue, appellant demanded a trial by jury, which was duly empanelled and sworn to try the cause; that after appellant had submitted his evidence, said Noble filed his demurrer to the evidence and failed to make the evidence a part of his demurrer, and asked that the cause be withdrawn from the jury and submitted to the court; that in such demurrer, appellant failed to join, nor did he consent, in any way, to the withdrawal of the cause from the jury; and because the only judgment rendered in the aforesaid suit was, that plaintiffs therein should pay the costs.

It is very clear, we think, that the court committed no error in sustaining appellees' demurrer to the foregoing reply. In such reply appellant makes a collateral attack upon the validity of the former adjudication, pleaded by appellees in bar of his present action. He has stated in his reply certain defects, irregularities, and, perhaps, errors in such former adjudication, but, of these, there is not one which he could not

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have been relieved from by an appeal to this court, and none, certainly, which would render the adjudication absolutely void, where, as here, it is attacked collaterally. In such a case, unless the former adjudication be shown to be void, it will constitute a good and complete defence in bar of any other suit for the same cause of action. The principal grounds upon which appellant claimed, in his reply, that the former adjudication was not a sufficient bar to the prosecution of his pending suit, were, that he had failed to join in the demurrer to the evidence, and that he had never consented, in any way, to the withdrawal of the cause from the jury. It will be observed, that appellant has failed to aver, in his reply, that either of these grounds was shown by the record of the former adjudication. In the absence of such an averment, we must presume that the record of the former adjudication is regular and formal, and free, even, from apparent error, and that none of the facts alleged by appellant, against the validity of such adjudication, are shown by the record thereof. This is the doctrine of many of our decided cases. *Reid v. Mitchell*, 93 Ind. 469; *Dowell v. Lahr*, 97 Ind. 146; *McCaslin v. State, ex rel.*, 99 Ind. 428; *Exchange Bank v. Ault*, 102 Ind. 322; *Baltimore, etc., R. R. Co. v. North*, 103 Ind. 486; *Cassady v. Miller*, 106 Ind. 69; *Pickering v. State, etc.*, 106 Ind. 228.

The facts stated in the reply were not sufficient to show that the former adjudication was invalid and void, and, therefore, the demurrer to the reply was correctly sustained.

The judgment is affirmed, with costs.

Filed Dec. 10, 1886; petition for a rehearing overruled Jan. 7, 1887.

The Board of Commissioners of Knox County v. Montgomery.

No. 12,731.

THE BOARD OF COMMISSIONERS OF KNOX COUNTY v.
MONTGOMERY.

REVIEW OF JUDGMENT.—*Conclusiveness of Order Granting.*—*Appeal.*—*Pleading.*—A judgment granting a review of a judgment rendered upon the sustaining of a demurrer to a complaint, is, if not appealed from, conclusive as to the sufficiency of both the complaint for review and the complaint in the former case.

ACTION.—*Motion to Dismiss.*—*Bill of Exceptions.*—*Supreme Court.*—If a motion to dismiss an action in the trial court is not brought into the record by a bill of exceptions, no question relating thereto is presented on appeal.

COUNTY.—*Bridges.*—*Liability for Negligence.*—Counties are liable for injuries caused by negligence in constructing or maintaining bridges.

SAME.—*Evidence.*—*Establishment of Highway.*—*Validity of Proceedings.*—In an action against a county to recover for injuries caused by a defective bridge, evidence that the county commissioners assumed to establish the highway of which the bridge is a part, is competent, although it may appear that there are errors and irregularities in the proceedings. The validity of such proceedings can not be inquired into in such case.

NEGLIGENCE.—*Complaint.*—*Sufficiency After Verdict.*—Where a complaint alleges facts from which negligence may be inferred, it is good after verdict, although the word "negligence" is not used in characterizing the conduct of the defendant.

From the Gibson Circuit Court.

W. A. Cullop, G. W. Shaw and C. B. Kessinger, for appellant.

G. G. Reily, W. C. Niblack, J. H. Miller and J. E. McCullough, for appellee.

ELLIOTT, C. J.—At the December term, 1883, of the commissioners' court of Knox county, the appellee presented a claim for an allowance for injuries sustained by falling through a defective bridge. The claim was not allowed, and an appeal was taken to the circuit court. At the February term, 1884, of that court, an amended complaint was filed, to which a demurrer was sustained, and final judgment entered. At the May term of that year the appellee filed a complaint to review that judgment. A demurrer was filed and overruled to the complaint for review.

It is insisted by the appellee that, as the court overruled

100	69
131	59
131	419
109	69
137	144
138	614
109	69
140	205
142	472
109	69
146	537

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the demurrer to the complaint for review, and as the appellant did not appeal from that ruling, he is bound by it, for the effect of the judgment overruling the demurrer was to reinstate the former case. The authorities support this position. The judgment ordering a review, not having been appealed from, concludes the appellant.

In *Brown v. Keyser*, 53 Ind. 85, it was said: "A judgment for or against a review of a former judgment puts an end to the action for a review." This doctrine is approved in *Kepper v. Force*, 86 Ind. 81. This principle disposes of all that is said by appellant's counsel in their attack upon the complaint for review.

It is contended by counsel for the appellant, that the Gibson Circuit Court, to which the case was sent upon change of venue, erred in overruling the motion to dismiss. This motion is not exhibited in a bill of exceptions, and consequently no question is presented for our consideration. *Washington Ice Co. v. Lay*, 103 Ind. 48; *Crumley v. Hickman*, 92 Ind. 388; *Yost v. Conroy*, 92 Ind. 464 (47 Am. R. 156), and cases cited.

One of the causes assigned for a new trial is, that the court erred in admitting in evidence the record of the commissioners of Knox county ordering the location of the highway of which the bridge formed a part. Various objections to the proceedings are urged by the appellant, but none of them are available. In such an action as this there can be no inquiry as to the validity of the proceedings by which the board of commissioners assumed to establish a highway. It is enough to prove that the board assumed to establish the highway, and that the commissioners recognized the highway as one belonging to the county, and under their control. Evidence that they assumed to establish the highway is competent, although it may appear that there were the gravest errors and irregularities in the proceedings. *Houfe v. Town of Fulton*, 34 Wis. 608 (17 Am. R. 463).

The liability of counties for negligence in constructing or

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maintaining bridges is no longer an open question in this State, for there are many cases declaring that they are liable. *Board, etc., v. Rickel*, 106 Ind. 501, see p. 502; *Vaught v. Board, etc.*, 101 Ind. 123; *Board, etc., v. Bacon*, 96 Ind. 31; *Patton v. Board, etc.*, 96 Ind. 131; *Board, etc., v. Emmerson*, 95 Ind. 579; *Board, etc., v. Legg*, 93 Ind. 523 (47 Am. R. 390); *Board, etc., v. Brown*, 89 Ind. 48; *Board, etc., v. Deprez*, 87 Ind. 509; *Board, etc., v. Pritchett*, 85 Ind. 68; *Pritchett v. Board, etc.*, 62 Ind. 210; *House v. Board, etc.*, 60 Ind. 580 (28 Am. R. 657).

The complaint is sufficient after verdict. If it were granted that it would be bad upon demurrer because of the failure to characterize the conduct of the appellant as negligent, by the use of the epithet negligence, still, there are facts stated from which negligence may be fairly inferred, and this certainly makes the complaint good after verdict, if, indeed, it would not be good upon demurrer. The question, however, does not come to us upon demurrer. In truth, the question is not legitimately before us in this action in any form, for the sufficiency of the complaint was established by the judgment in the action brought to review the judgment declaring the complaint bad. As that judgment is conclusive it can not be overthrown in this appeal.

Judgment affirmed.

Filed Dec. 22, 1886.

109	71
166	656

No. 12,630.

CUMMINS v. PEED ET AL.

PLEADING.—Complaint.—Name.—Initial Letters.—Decedents' Estates.—Practice.—The fact that only the initial letters of the Christian name of the plaintiff are given in a claim against a decedent's estate is not such a defect as warrants the reversal of the judgment, where there is no demurrer or assignment of error questioning the sufficiency of the complaint.

Cummins v. Peed et al.

CONTRACT.—*Conditional Insurance.*—*Forfeiture.*—*Sale.*—*Executor.*—Where a mare, insured to get with foal, is sold by the executor of the owner within eleven months from the date of service, in violation of a condition that a sale by the owner within that time should forfeit the insurance, the price for the service may be recovered.

From the Henry Circuit Court.

A. W. Leonard and L. P. Mitchell, for appellant.

J. H. Mellett and E. H. Bundy, for appellees.

ZOLLARS, J.—Appellees filed a claim against the estate of Isaac S. Maddy, deceased. Appellant, as the representative of that estate, having failed to allow the claim, it was docketed for trial by the court. The court made a special finding of the facts, and upon conclusions of law, based upon those facts, rendered judgment for appellees for the amount of the claim.

One of the grounds urged for a reversal of the judgment is, that the claim as filed did not contain the full names of appellees as claimants, initial letters being used instead of their given names. There was no demurrer below, neither was the attention of the court in any way called to the defect which counsel now urge. The assignment of errors here is not such as to call in question the sufficiency of the complaint.

The record before us is not in shape to warrant a reversal of the judgment because initial letters were used instead of the full given names of the claimants. *Hopper v. Lucas*, 86 Ind. 43 (50), and cases there cited.

The claim was for the services of appellees' stallion horse for the season, at the agreed sum of \$20 each for two mares. Appellees "insured" the mares to get with foal, but it was also agreed between them and Maddy, the decedent, that if he parted with the ownership of the mares before the expiration of eleven months from the date of the service of the horse, he should forfeit the insurance, and pay the agreed sum of \$40. Within the eleven months Maddy died, and appellant, as executor, sold the mares. They were not with foal.

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It is contended by appellant, that appellees should be held to their insurance, independent of the condition, and that as the mares were not with foal, they should not recover. We think otherwise. The insurance or warranty on the part of appellees was conditional, the condition being that Maddy should not part with the ownership of the mares before the expiration of eleven months from the date of the service of the horse. It is not clearly apparent why this condition was annexed, nor how it could be of much importance, but it was a condition which the parties had a right to couple with the "insurance," and one, therefore, by which they and their representatives were and are bound. The purpose seems to have been to keep the ownership with Maddy, and the mares in his possession and under his control, and to make the insurance dependent upon such continued ownership, possession and control. That the mares were sold before the expiration of the eleven months, in consequence of Maddy's death, does not turn the conditional insurance into an absolute insurance. The stipulated condition has not been complied with, and that relieves appellees from their insurance. Maddy might have stipulated that the condition should be dispensed with in the event of his death, but he did not do so. See *Campbell v. Hamilton Mutual Ins. Co.*, 51 Maine, 69.

Judgment affirmed, with costs.

Filed Jan. 4, 1887.

No. 12,361.

THE STATE, EX REL. PRILLIMAN, v. THE TOWN OF
TIPTON ET AL.

109	73
150	430

Town.—*Adoption of City Charter.—Election.—Quo Warranto.—Pleading.*—It is sufficient if a majority of the legal voters who vote at an election held in an incorporated town to determine whether a city charter shall be adopted, agree to the change, and an averment in an information to

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test the legality of the city organization, that a majority of the legal voters of the town did not vote in favor of the change, is insufficient.

SAME.—Inspector's Statement.—Record of County Clerk.—Presumption of Discharge of Duty.—When nothing is shown to the contrary, it will be presumed that the inspector of such election certified to the clerk of the circuit court a proper statement of the votes cast, and that the clerk made a record of the statement in his office, as required by law.

SAME.—Conclusiveness of Clerk's Record.—Census.—The record made by the clerk is conclusive of the regularity of all the previous proceedings, except as to whether a majority of the votes given favored the adoption of a city charter, and it is too late to thereafter question the regularity of the census taken.

SAME.—Legality of City Organization.—Quo Warranto by Private Citizen.—Sufficiency of Information.—An information in the nature of a *quo warranto* by a private citizen, to test the legality of a city organization, must show (1) that the relator is interested in the subject-matter, (2) that he did not by his vote, or otherwise, concur in the proceedings of which he complains, and (3) that, where there is no fraud or intentional violation of law, no public or private interest will be seriously affected by the granting of the relief demanded.

From the Tipton Circuit Court.

J. Jones, for appellant.

J. I. Parker, R. B. Beauchamp and J. A. Swoveland, for appellees.

NIBLACK, J.—This was a proceeding in the nature of a writ of *quo warranto*, prosecuted in the name of the State, on the relation of Martin Prilliman, against the town of Tipton, now claiming to have become an incorporated city, under the name of the City of Tipton, for the purpose of testing the legality of the alleged city organization. All the persons claiming to act as officers under the organization known as the City of Tipton were also made defendants.

The information gave the court below to understand and be informed that Prilliman, the relator, was a resident and duly qualified voter within the corporate limits of the town of Tipton, as theretofore known, and the owner of real estate and a taxpayer therein; that, on the 20th day of November, 1883, a petition was presented to the board of trustees of

The State, *ex rel.* Prilliman, v. The Town of Tipton *et al.*

said town of Tipton, signed by one-third of the qualified voters of such town, asking that a census be taken of the inhabitants thereof under the order of said board; that said board thereupon made an order, and caused it to be spread on the records of said town, requiring the marshal to take a census of all the inhabitants of said town, that is to say, of all persons residing within its limits forty days anterior to the time of making such order, and to make a return of such census within sixty days thereafter; that a warrant so directing the marshal was accordingly issued to him, but that said board of trustees did not provide or furnish proper forms to enable the marshal to take such census; that the marshal never made any return of the warrant so issued to him, or of the census he was required to take; that forty days prior to the date of the order requiring the census to be taken as stated, there were only fifteen hundred and fifty persons residing within the corporate limits of said town; that, on the 15th day of January, 1884, said board of trustees made a pretended record showing that said warrant, and a census of said town, had both been returned, and that according to such pretended census said town contained a population of two thousand persons; that said record was false, and was known to be so by said board of trustees when it was made; that on said 15th day of January, 1884, said board of trustees also ordered a pretended election to be held to determine whether said town of Tipton as a municipal organization should be changed to that of a city; that a majority of the legal voters of said town did not vote in favor of adopting a city charter for the government of its inhabitants; that said board of trustees, pretending that a majority of said duly qualified voters had voted in favor of adopting a city charter, ordered that another election should be held, on the 11th day of March, 1884, for the purpose of electing persons to fill the various offices provided for in a city about to be organized under the laws of this State; that at said pretended election certain persons, naming them, and made defendants in this

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proceeding, as herein above stated, claimed to have been severally elected to fill said offices; that all the persons, claiming to have been so elected, had entered upon the duties of their several pretended offices, and had usurped the franchises and offices of a city government. Wherefore the defendants were required to answer as to the several matters alleged against them.

A demurrer was sustained to the information, and final judgment was rendered upon demurrer, in favor of the defendants.

Section 1131, R. S. 1881, authorizes proceedings in the nature of *quo warranto* to settle questions similar to those sought to be raised by the information in this case, and the succeeding section provides that "The information may be filed by the prosecuting attorney in the circuit court of the proper county, upon his own relation, whenever he shall deem it his duty to do so, or shall be directed by the court, or other competent authority, or by any other person on his own relation, whenever he claims an interest in the office, franchise, or corporation which is the subject of the information."

Section 3031, R. S. 1881, and the six immediately succeeding sections, prescribe the manner in which the inhabitants of an incorporated town may, under certain circumstances, adopt a city charter, and thus become an organized city under the general laws of this State. This right of adopting a city charter is, however, by section 3033, limited to cases in which the marshal of an incorporated town makes return of a census showing a population of at least two thousand persons.

Section 3035 provides for the submission of the question as to whether the town shall become an incorporated city, to the qualified voters, and that when a majority of the ballots cast at the election held to determine that question shall be in favor of the proposed change, the inspector shall certify the result to the clerk of the circuit court of the proper county, who shall make a record in his office of the state-

The State, *ex rel.* Prilliman, v. The Town of Tipton *et al.*

ment thus certified to him. By section 3036, it is enacted that "Such town shall thereafter be deemed an incorporated city, with the powers and franchises appertaining thereto; and the record in the office of the clerk, as aforesaid, shall be held in all courts as conclusive evidence of such incorporation in any suit pending therein. But nothing in this act contained shall preclude any person interested from showing that a majority of the legal voters of any such town or city had not agreed to such change."

Construing this latter clause of section 3036 with the preceding section, to which reference has been made, it must be held to mean that nothing contained in the sections of the statute under consideration shall be construed as precluding any person interested from showing that a majority of the legal voters, who voted at the election held to determine the question, had not agreed to adopt a city charter.

It is not averred that the inspector of the election in question in this case did not certify to the clerk of the circuit court a proper statement of the votes cast at that election, and that the clerk did not make a record of such statement in his office.

As every officer, when there is no averment, or reasonable inference of fact to the contrary, is presumed to have done his duty, we must assume that a proper statement was certified by the inspector, and that a suitable record of it was made by the clerk.

As the record which the clerk presumably made in this case is conclusive of the regularity of all the previous proceedings, except as to whether a majority of the votes given was in favor of the proposed change, it was, when this information was filed, too late to make a question as to whether such a census of the town of Tipton was taken as the law requires.

The averment in the information, that a majority of the legal voters of the town of Tipton did not vote in favor of the adoption of a city charter, was not the equivalent of an averment that a majority of the votes given at the election

The State, *ex rel.* Prilliman, v. The Town of Tipton *et al.*

was not favorable to the proposed change from a town to a city government, and was, consequently, insufficient to present the question as to whether a majority of those lawfully voting had agreed to the proposed change.

Then, too, to authorize the prosecution of an information in the nature of a *quo warranto*, at the suit of a private person, in a case of the class to which the one before us belongs, it must be shown :

First. That the relator is not a mere stranger, or intermeddler, or, in other words, that he is interested in the subject-matter embraced in the information.

Second. That he did not concur in the act or matter of which he complains.

Third. That, where there is no fraud or intentional violation of law, no public or private interest will be seriously affected by the granting of the relief demanded. 2 Dillon Munic. Corp., section 901.

There having been in the information, under consideration, no allegation that Prilliman, the relator, did not vote in favor of adopting a city charter, or otherwise concur in the proceedings of which he complains, the information was for that reason, also, materially defective. On the same general subject, see the cases of *Stultz v. State, ex rel.*, 65 Ind. 492, and *Mullikin v. City of Bloomington*, 72 Ind. 161.

We have not considered the question as to whether, upon the facts stated, Prilliman was shown to be a proper relator in the cause.

The judgment is affirmed, with costs.

Filed Jan. 5, 1887.

Robertson v. The State, *ex rel.* Smith.

No. 13,565.

ROBERTSON v. THE STATE, *EX REL.* SMITH.

JURISDICTION.—*Judgment.*—Jurisdiction of the subject-matter and of the person is essential to the validity of all judicial judgments, and where there is no jurisdiction the court will not express an opinion upon the merits of the controversy.

SAME.—*Quo Warranto.*—*Office.*—*Civil Action.*—An information in the nature of a *quo warranto* to settle the title to a public office is a civil action, and, under section 312, R. S. 1881, must be filed in the county where the defendant has his last and usual place of residence.

SAME.—*Constitutional Law.*—*Lieutenant-Governor.*—*Contested Election.*—A claimant of the office of Lieutenant-Governor can not maintain an information in the nature of a *quo warranto* to settle the title to that office, as section 6 of article 5 of the Constitution vests exclusive jurisdiction of such controversies in the General Assembly. Per ELLIOTT, C. J., and NIBLACK and ZOLLARS, JJ., separate opinions, see pages 123, 115, 134, respectively. MITCHELL and HOWE, JJ., contra, see p. 88. Opinions on petition for a rehearing by ELLIOTT, C. J., and NIBLACK, J., see pages 151, 153, respectively.

From the Marion Circuit Court.

L. T. Michener, Attorney General, *B. Harrison*, *W. H. H. Miller* and *J. B. Elam*, for appellant.

D. Turpie, *J. B. Brown* and *C. Byfield*, for appellee.

ELLIOTT, C. J.—On the 12th day of January, 1887, the relator, Alonzo G. Smith, filed an information against the appellant, praying an injunction against him restraining him “from intruding, or attempting to intrude, himself into the office of Lieutenant-Governor,” and for a judgment of ouster, “excluding him” from that office.

The relator’s information alleges, that, on the 4th day of November, 1884, the relator was duly elected a member of the Senate of the General Assembly of the State of Indiana; that he duly qualified, and that on the 13th day of April, 1885, he was chosen President of the Senate; that he accepted the office, and entered on the discharge of its duties; that upon the assembling of the Senate in January, 1887, he was re-elected President of that body, and was in possession of that office at the time the information was filed. It is also alleged

100	79
126	596
100	79
129	432
100	79
133	206
100	79
143	233
100	79
164	699

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that Mahlon D. Manson was elected to the office of Lieutenant-Governor in November, 1884, and that, having qualified, he held that office until July, 1886, when he vacated it by accepting a Federal office; that, on the 2d day of November, 1886, at the general election then held, a majority of the voters of the State, assuming that a vacancy existed in the office of Lieutenant-Governor, were procured to vote for the respondent for that office; that returns of the vote, regular in form, were made by the proper officers; that such returns were duly certified to the secretary of state, and that certified statements of the vote were duly delivered to the Speaker of the House of Representatives. It is further alleged, that, on the 10th day of January, 1887, the Speaker of the House of Representatives opened and published the returns in the presence of the members of the House of Representatives, the Senate not being present, nor in session at the time; that the Speaker declared that the respondent had received a majority of the votes cast at the election, and had been duly elected Lieutenant-Governor; that the respondent thereupon took the oath of office, and unlawfully intruded into the office by attempting to exercise its functions and duties, and that the Speaker of the House recognized him as the Lieutenant-Governor of the State. The information also avers that the respondent claims the right to exercise the functions of the office of the President of the Senate, and is unlawfully interfering with the rights of the relator as such officer, and that the Senate, by a majority of its members, supports the claim of the relator to be the presiding officer, while the House of Representatives, by a majority of its members, sustains the claim of the respondent.

Summons was issued and served on the appellant, and a temporary restraining order was granted enjoining him from attempting to perform any of the duties of the office of President of the Senate. From this order the appellant appeals.

On the 13th day of January, 1887, the appellant entered a special appearance, and filed a verified plea denying the ju-

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jurisdiction of the court, alleging in his plea that he had never been a resident or inhabitant of Marion county, but was, and had been for more than twenty years, a resident and citizen of the county of Allen. The appellee demurred to this plea, and his demurrer was sustained.

The question at the threshold is this: Had the circuit court jurisdiction to hear and determine the cause? If that court had no power over the cause, this court, of course, has none.

Two things are absolutely essential to the power of a court to decide a legal controversy, jurisdiction of the subject-matter and jurisdiction of the person. Both must exist; otherwise it is the imperative duty of the court to decline to do more than ascertain and declare that it has no power to examine or decide the merits of the controversy. Authors and courts agree upon this rudimentary principle of law. Neither in reason nor upon authority can there be a doubt as to its soundness. Power is essential to the validity of every act, judicial, legislative or executive. Where there is no power to hear and determine there can be no judicial decision. Expressions of individual opinion there may be, but a judicial judgment there can not be. A judicial judgment is the product of power, the power of the law, and is not the mere expression of the individual opinion of a judge.

The question is purely and intrinsically one of power, for the jurisdiction of a court consists solely in its power to hear and determine the causes brought to its bar. If jurisdiction does not exist, power is absent, and if power is lacking, an expression of opinion upon any other than a jurisdictional question, although judicial in form, is simply the opinion of its author, valuable it may possibly be as an argument, but effective as the opinion of the court, it is not.

"Jurisdiction," says a recent writer, "is the right to pronounce judgment acquired through due process of law." Herman Estop. and Res Judicata, section 69. At another place this writer says: "Jurisdiction is authority to hear and

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determine." *Ibid.*, section 73. Again, speaking of the court, he says: "It must act judicially in all things, and can not then transcend the power conferred by the law." *Ibid.* In *Mills v. Commonwealth*, 13 Pa. St. 627, the court said: "Jurisdiction in courts is the power and authority to declare the law. The very word in its origin imports as much. It is derived from *juris* and *dico*. I speak by the law." Chief Justice SHAW said: "To have jurisdiction is to have power to inquire into the fact," and "to apply the law." *Hopkins v. Commonwealth*, 3 Met. 460. Chief Justice MARSHALL, speaking upon a kindred subject, said: "Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing." *Osborn v. U. S. Bank*, 9 Wheat. 738, 866. In *re School-Law Manual*, 4 Atl. Rep. 878, the Supreme Court of New Hampshire declared that where there was no jurisdiction, it was not only the duty of the court not to express an opinion, but it was its duty not to have an opinion on the merits of the cause. The Supreme Court of Texas, in *Withers v. Patterson*, 27 Texas, 491, said: "The jurisdiction of a court means, the power or authority which is conferred upon a court, by the Constitution and laws, to hear and determine causes between parties, and to carry its judgments into effect."

These are a few, only, of the many statements that abound in the books and reports and declare, what all must concede to be, the law of the land. Accepting these statements as correct, then, the conclusion must be, that where there is no jurisdiction there is no power. No consideration can be imagined, nor reason conceived, which will justify a court in assuming to pronounce a judgment where it has neither the right nor the power to hear or decide. It is only where courts can speak by the law, that they can rightfully speak at all.

An expression of opinion by a judicial tribunal, where it has no power to speak by the law, is utterly devoid of force. A decision without jurisdiction is a judgment only in form,

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for it is absolutely and everywhere void. The author from whom we have quoted says: "If a court has no jurisdiction its decision is a nullity, and it matters not what facts it finds, or what questions it decides—in fact they are all nullities. If without jurisdiction it can not adjudicate the real merits of the case, it can not adjudicate any other question, whether it be introductory, incidental, or collateral." Herman Estop., etc., section 68. Another author says: "Where there is no jurisdiction, it does not belong to the proper functions of a court to give an opinion upon a matter submitted to them, for the guidance of parties or inferior tribunals. * * * * The whole business of a court is confined to giving decisions in cases properly before it." Wells Jurisdiction, 10.

In *Elliott v. Peirsol*, 1 Peters, 328, the Supreme Court of the United States said, in speaking of a court: "But if it act without authority, its judgments and orders are regarded as nullities." Our own court has decisively affirmed this elementary doctrine. *Smith v. Myers*, *ante*, p. 1.

The only course which a court can rightfully pursue is to decline to speak in all cases where it can not speak by the law. It is not a matter of choice; it is a matter of duty. The duty is as solemn and imperative as any one among all the grave duties that rest upon the courts of the country. Nor ought the courts to give opinions which are in form judgments, but in reality mere phantomatic resemblances, since, in more ways than one, such a course is productive of evil.

To the judicial department, as the most conservative of all the co-ordinate branches of the government, is entrusted the high duty of declaring and enforcing the law as it exists, and upon the officers of that department rests, more strongly than upon the officers of the other departments, the solemn obligation to unwaveringly abide by the established principles of law. A great and important part of the duty of the courts is to compel citizens and officers to obey the rules of law, and they can not, upon any imaginable ground, be themselves excused for violating those principles. It is the plain and

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solemn duty of the courts to apply to themselves the rules which they enforce against others. Courts, most of all the instruments of the law, should sternly refuse to transgress its rules. It is an established principle of law, long settled and firmly maintained, that a court will not decide any question affecting the merits of a case over which it has no jurisdiction, and no court can, without a plain and inexcusable breach of duty, violate that principle. No one thing in all jurisprudence can be of higher importance than that the judiciary should inflexibly adhere to the law as it comes from the hands of the law-makers.

The question upon the facts stated in the appellant's plea is, whether there was any jurisdiction in the circuit court over the person of the appellant's person? not whether there was a defect in its process, or an irregularity in the service of its writs? There is no middle ground; there is either complete jurisdiction, or an utter want of jurisdiction. If, upon the facts stated in the plea, the law is that the appellant may be sued in Marion county, there is plenary jurisdiction. If the law is that he can not be there sued, then there is an absolute want of power to proceed a single step against him. It is either power or no power. The court can not look beyond or outside of the record, and on the record the question is, was there any jurisdiction at all?

It is enough for the decision of this case to affirm that there was no jurisdiction of the person of the appellant. It is not necessary, nor, indeed, proper, to decide any other questions than those of jurisdiction. The want of jurisdiction of the person is fatal to the right to go further into the cause. It is an elementary rule, that, without jurisdiction, there is no validity or vitality in any judgment, for, to give the slightest vitality to the judgment, there "must be jurisdiction of the cause and of the person." Herman Estop., etc., section 54. As there was no jurisdiction of the person, this cause can not, in any event, go back to the court from which it came for trial, but it goes back there only to be cast out.

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Jurisdiction of the person of the appellant could only have been acquired in an action brought in the county of Allen, where he resided.

Section 312, R. S. 1881, governs this case, for it does not fall within the provisions of any other section. That section reads thus: "In all other cases, the action shall be commenced in the county where the defendants, or one of them, has his usual place of residence." This language is broad and comprehensive in its scope, and mandatory in its effect. It is the positive command of the law that all actions, except those otherwise provided for, shall be brought in the county where the defendant resides, and there is no authority to bring them elsewhere. It is not within the power of the court to create an exception. That would be judicial legislation, and judicial legislation is always odious, for legislation by the courts is usurpation. There is no escape from the command of the statute, and it is the duty of the courts to enforce it; they have no discretion to change it, nor have they power to take a case out of its operation. They must apply the law, as it is written in section 312, to all cases for which a different provision has not been made by the Legislature. If the law is faulty the Legislature, and not the courts, must amend it, for the courts have no authority to change a line or a word, since there is neither ambiguity nor obscurity. Section 1132 does not impair the force or effect of the section under immediate mention. The provision of section 1132 is, that an information may be filed by the prosecuting attorney of the circuit court "in the proper county," and "the proper county" can only be ascertained by exploring the statute. It is to the law, and to the law alone, that we can look to ascertain what is "the proper county," and the law informs us that "the proper county" is the county of the defendant's usual residence. The "proper county" can only be the county where the law authorizes actions to be instituted, for no other county can with accuracy or propriety be said to be "the proper county."

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Our cases have uniformly held that all actions, except those for which express provision is made, must be brought in the county where the defendant resides. A forcible example is supplied by the case of *State v. White Water, etc., Co.*, 8 Ind. 320, which was an action to compel, by mandate, the rebuilding of a bridge in Dearborn county. The court held that the action must be brought in Fayette county, where the defendant resided, saying, among other things: "But it is assumed that the present action is local in its nature, and must be brought in the county where the duty sought to be enforced is to be performed. The code points out and defines the subject-matter of all the actions which must be instituted in the county in which the subject of the action, or some part thereof, is situated. But the case at bar does not seem to be within the definition." *Hawley v. State, ex rel.*, 69 Ind. 98, strongly enforces the same general doctrine. That was a prosecution for bastardy, and it was held that it must be instituted in the county where the defendant resided, the court saying: "Such proceedings, being transitory in their character, must, under the code, be commenced in the county in which the defendant resides when he is a resident of the State."

In other cases the court has asserted the policy of the statute to be, what, indeed, its language plainly imports, to require all actions, not expressly otherwise provided for, to be brought in the county where the defendant resides. *Hodson v. Warner*, 60 Ind. 214; *Boorum v. Ray*, 72 Ind. 151; *Robbins v. Alley*, 38 Ind. 553; *Ewing v. Ewing*, 24 Ind. 468; *Michael v. Thomas*, 24 Ind. 72; *McCauley v. Murdock*, 97 Ind. 229; *State, ex rel., v. Board, etc.*, 49 Ind. 457; *Coleman v. Lyman*, 42 Ind. 289.

It must, therefore, be deemed the settled law of this State, that all actions must be brought in the county where the defendant resides, except such as the statute expressly provides shall be brought elsewhere.

It is assumed that this is not strictly a civil action, but is

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a special proceeding, and is not governed by section 312, R. S. 1881. But it has been expressly ruled that such a proceeding as this is a civil action. In *Reynolds v. State, ex rel.*, 61 Ind. 392, the question came directly before the court, and in deciding it the court said: "It is clear, we think, from this section of the code, that an information in the nature of a *quo warranto*, in this State, is a civil action."

If, however, it were conceded that the position of the appellee is tenable, still, it would by no means result that section 312 does not apply, for it is now quite well settled that the provisions of the code do apply to all proceedings, whether under special statutes or not, unless excluded by the provisions of those statutes. *Evans v. Evans*, 105 Ind. 204; *Bass v. Elliott*, 105 Ind. 517, and cases cited; *Burkett v. Holman*, 104 Ind. 6; *Burkett v. Bowen*, 104 Ind. 184; *Powell v. Powell*, 104 Ind. 18.

Statutes are to be regarded as forming parts of one great and uniform body of law, and are not to be deemed isolated and detached systems complete in themselves. *Humphries v. Davis*, 100 Ind. 274 (50 Am. R. 788); *Lutz v. City of Crawfordsville*, *post*, p. 466.

It would be a departure from principle to declare that each "special proceeding" is complete in itself, and it would be a departure productive of serious evils, for scarcely one of all the "special proceedings" can be carried into practical effect without aid from the code of civil procedure. It is necessary in almost, if not quite, every instance, to refer to the provisions of the code in order to give any effect to these special proceedings, and certainly this must have been intended by the Legislature, for had it undertaken to make each system complete in itself, many ponderous volumes of statutes would have been required.

It is the judgment of this court that the circuit court had no jurisdiction to grant the order of injunction, and that, upon the facts set forth in the appellant's plea, that court had no jurisdiction of the person of the appellant.

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The cause is remanded, with instructions to dissolve the restraining order, and for further proceedings in accordance with this opinion.

Filed Feb. 23, 1887.

DISSENTING OPINIONS OF MITCHELL AND HOWE, JJ.

MITCHELL, J.—While concurring in the opinion of the court, to the extent that it holds that an information to try the title to an office can only be tried,—unless by consent,—in the county in which the defendant resides, I do not concur in the view that there was such a want of jurisdiction in the court below, over the person of the defendant, as excuses this court from giving a statement in writing of each question arising in the record, and the decision of the court thereon. Section 5, Art. 7, Const. The record discloses that the appellant was personally served with summons in Marion county, that he appeared in person and by counsel, and pleaded in abatement of the jurisdiction of the court. It, therefore, became at most a mixed question of law and fact, to be determined by the learned judge, whether or not jurisdiction of the defendant's person had been acquired, either by the process of the court, or by the consent of the defendant. The court may have decided erroneously, but if it did, this was an error in no sense different from any other which occurs in the progress of a cause. As is said by a standard author: "There is a difference between a want of jurisdiction and a defect in obtaining jurisdiction. At common law the defendant was brought within the power of the court by service of the *brevia*, or original writ. In this country the same object is accomplished by service of summons, * * * or by the voluntary appearance of the defendant in person, or by his attorney. From the moment of the service of process, the court has such control over the litigants that all its subsequent proceedings, however erroneous, are not void. If there is any irregularity in the process, or in the manner of its service, the defendant must take advantage

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of such irregularity by some motion or proceeding in the court wherein the action is pending." Freeman Judgments, section 126.

It can not, therefore, with propriety be said, that the court below had no jurisdiction over the person of the defendant. It decided upon inspection of its own process, that it had jurisdiction, and while it may be true, that upon the facts as they appear, or may be hereafter shown, its jurisdiction may have been defectively obtained, and that the restraining order may well be for that reason dissolved, it does not follow that this court, because it finds one error, is thereby excused from giving its decision upon the real questions which the record presents.

Certainly no court has ever set up the unwarranted pretence that it could with propriety either give a decision, or intimate an opinion, in a case which involved a subject-matter over which it had no jurisdiction, or where it had no jurisdiction of the parties.

The record before us does not present such a case. If the court below had decided, as it very properly did, in the recent case of *Smith v. Myers*, *ante*, p. 1, that it had no jurisdiction of the subject-matter, the duty of this court would have terminated with the examination of that question. So, also, if after having acquired, through its process, jurisdiction of the appellant's person, it had decided that its jurisdiction was so imperfect as not to warrant it in proceeding further, the examination of that question would have ended our duty on this appeal. The court below, however, decided that it had jurisdiction of the person of the defendant, and proceeded to adjudge other questions which appear in the record. Precedents will be looked for in vain to support the proposition that an erroneous decision of a *nisi prius* court, on the subject of the completeness of its jurisdiction over the person of a litigant, renders it improper for an appellate court, after the *nisi prius* court has held its jurisdiction complete, to examine

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other questions subsequently decided by such court, and properly presented by the record.

The reasons why such questions should be passed upon is, that it is within the power of the parties, at any moment, to perfect the defective jurisdiction of the court below over their persons by consent. We can not say in advance, that they may not do so, especially if the decision of the court should be favorable to the party defectively served.

"This is in accordance with the general line of judicial precedent, and is sanctioned by an example furnished by so illustrious a tribunal as that of the Supreme Court of the United States, under the presidency of Chief Justice MARSHALL, he himself delivering the opinion in the given case. *Marbury v. Madison*, 1 Cranch, 137. We can not greatly err in following the precedent set by so learned and pure a court." *State, ex rel., v. Allen*, 21 Ind. 516.

The questions of chief concern to the parties, and which, by reason of the relation of the parties to the State, are of vital importance to the public, relate to the jurisdiction of the court over the subject-matter of the information. This subject also involves the validity of the election held in November, 1886, for Lieutenant-Governor.

These subjects concern the second office in one of the departments of State. Between the office in contest, and that of Chief Executive of the State, is interposed only the slender thread upon which hangs a single life. Should the Governor become disabled, the confusion which vexes the public service now would be transferred to, and turn into chaos, the office of the Chief Executive, to be settled by such means as the contestants and their respective adherents might be able and willing to employ.

The question always properly first in order in every court is, whether it has jurisdiction over the subject-matter of the suit. This and cognate questions were elaborately argued by learned and eminent counsel on both sides. The exigencies of the public service demand that they should be settled.

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The relator's case proceeds upon the theory that an election for Lieutenant-Governor can only occur once in four years. His claim is, that in April, 1885, the Senate, of which body he was then and still is a member, elected him as its president *pro tempore*. By virtue of this election, he asserts that he became vested with a right to discharge the duties of the office of President of the Senate, on any occasion when the Lieutenant-Governor should thereafter be absent, until the Senate, in its pleasure, should remove him. He alleges that the Senate, when it assembled in January, 1887, recognized his right, and re-elected him to the office. Thus he claims to have been incumbent in the office of President of the Senate by a title founded in the Constitution, at the time and before the election in 1886 occurred, and that he is now in the discharge of its duties under the authority of the Constitution.

Thus he asserts that the Constitution has prescribed a method for supplying any vacancy which may occur in the office in question during the period intervening quadrennial elections, and that by his election by the Senate, the office was supplied before the election in 1886 occurred. Hence, the argument is, there was no vacancy which authorized or required an election by the electors of the State, or which gave color of support to any of the subsequent steps in that connection, resulting finally in the declaration by the Speaker of the House that the respondent had been elected to the office of Lieutenant-Governor.

The position of the respondent is, in effect, that if both the law and the fact be as claimed by the relator, yet the court can not so decide: *First*. Because the controversy involves a contest over the election of, and is, therefore, said to be a contested election for, Lieutenant-Governor. All such contests, it is argued, are by the Constitution expressly committed to the final determination of the General Assembly. *Second*. Because, even though this should not be considered a case of contested election, since the subject of the informa-

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tion involves the right to exercise an office which pertains to a co-ordinate branch of the State government, the contention is, that it is a matter exclusively of political, and not of judicial concern. Hence it is said the subject-matter is foreign to the jurisdiction of, and is not cognizable by, the courts.

The first question for consideration, therefore, is, do the facts presented in the information make this a case of contested election, within the purview of section 6, article 5, of the Constitution, which reads as follows: "Contested elections for Governor or Lieutenant-Governor shall be determined by the General Assembly, in such manner as may be prescribed by law?"

Pursuant to this provision the General Assembly has enacted, in substance, that the election of any person declared elected by popular vote to any State office, may be contested by any elector entitled to vote for such person. Provision is made for the organization of a committee, to be selected from the members of both houses, before which the contest is to be carried on. The causes of contest are prescribed, and the mode of procedure marked out. The judgment of this committee is to be reported to each house separately, and is to be conclusive.

The causes for which an election may be contested are, (1) irregularity or malconduct; (2) ineligibility of the contestee; (3) infamous crime in the contestee; (4) illegal votes. Section 4756, R. S. 1881.

An examination of the Constitution and the legislation which has followed makes it manifest that all contested elections for Governor or Lieutenant-Governor are committed to the exclusive judgment of the General Assembly, to be determined by the committee for which provision is made, under the rules and regulations prescribed in the statute.

From the authorities and upon principle, these general conclusions may be deduced: 1. When the Constitution confers the power, and enjoins the duty, of determining con-

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tested elections upon the General Assembly, its power in that respect is plenary, final and exclusive, in the specific cases mentioned. 2. When the Constitution confides to a legislative body the power to judge of the election and qualification of its own members, the exercise of that power belongs exclusively to the body to which it is so committed, and is not the subject of review in the courts or by any other body. *State, ex rel., v. Baxter*, 28 Ark. 129; *State, ex rel., v. Marlow*, 15 Ohio St. 114; *State, ex rel., v. Tomlinson*, 20 Kan. 692; *People v. Mahaney*, 13 Mich. 481; *People v. Fitzgerald*, 41 Mich. 2; *Alter v. Simpson*, 46 Mich. 138; *State v. Gilmore*, 20 Kan. 551 (27 Am. R. 189); *O'Ferrall v. Colby*, 2 Minn. 180; Cooley Const. Lim. 133; McCrary Elec., section 515; *Hulseman v. Rems*, 41 Pa. St. 396.

While it is undoubtedly true that every contested election involves the title to an office, it can not with propriety be said that every contest or litigation which involves the title to an office, is a contested election. If the relator had, as he assumes, a vested legal right in the office of President of the Senate, which had its inception, and attached to him prior to, and which is in no wise dependent upon, or connected with the election through which the respondent claims, it is not apparent how such right can become involved in a contested election. If, under the Constitution and law, the relator had a right anterior to the election, and if, as he further assumes, the election was unauthorized, then the mere holding of such election could not involve the pre-existing title in an election contest. The vested right could not have been annihilated by an unauthorized election, nor can the question of the existence of such a right, anterior to and independent of the election, be taken out of the cognizance of the judicial tribunals, by the mere fact of an election. *Magruder v. Swann*, 25 Md. 173.

The logic of the adverse contention is, conceding all that the relator claims in respect to his antecedent right, as well as the invalidity of the election, that the title of the relator,

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has nevertheless become so involved in and confused by the form of an election, that there is now no power to ascertain and declare the title, except by resolving the controversy into a case of contested election, and by sending it to the General Assembly. By this method of reasoning, the jurisdiction of the court over the subject-matter is sought to be defeated.

This view of the situation is not, in my opinion, maintainable either in reason or upon authority.

The right in dispute is cognizable only by judicial authority. All the judicial power of the State, except such as is specifically conferred upon other departments of the government, is committed to the courts. The authorities support the proposition that where one department of the government is, in special cases, authorized to exercise power which belongs in general to another department, the exercise of such power will be limited strictly to the subjects specially enumerated. To declare what the law is, is a judicial function. *Kilbourn v. Thompson*, 103 U. S. 168; *Marbury v. Madison*, *supra*; *People v. Keeler*, 99 N. Y. 463 (52 Am. R. 49).

The judicial power committed to the General Assembly is, in respect to the subject now under consideration, only such as strictly pertains to cases of contested elections for Governor and Lieutenant-Governor. The causes for such contest are specifically enumerated in the statute. These causes are only such as arise out of, and pertain to, an election.

Before there can be a contested election, an election must have been held. An election implies the choice of a qualified person to an office, by an electoral body, at the time, and *substantially* in the manner and with the safeguards provided by law. The electoral body may manifest its choice in a manner which leaves no doubt of the fact of choice, yet, if such choice be manifested at a time, or under conditions, unknown to the law, the fact of choice, however unmistakable, goes for nothing. Under a government such as ours, the people derive their power to elect officers from the written law, which they themselves have prescribed. It is

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not inherent, to be exercised upon any and every occasion when they may assemble together. The force and efficacy of the ballot are derived from the Constitution and laws, and no one can predicate title to an office upon a popular vote, unless such vote was cast at a time when the Constitution and laws authorized an election for that office to be holden. *People v. Weller*, 11 Cal. 49; *Foster v. Scarff*, 15 Ohio St. 532; *Sawyer v. Haydon*, 1 Nev. 75; *Biddle v. Willard*, 10 Ind. 62; *Commonwealth v. Meeser*, 44 Pa. St. 341; *State v. Stauffer*, 11 Neb. 173; *State v. Whittemore*, 11 Neb. 175; *State v. Buck*, 13 Neb. 273; *State v. Hedlund*, 16 Neb. 566; McCrary Elec., section 109; Cooley Const. Lim. (5th ed.) p. 747.

If, by the Constitution, the electors had surrendered to others, chosen by themselves, the power to supply the office, the title to which is in dispute, by electing another to perform the duties of the office, they may not, without changing the fundamental law, resume such power at their pleasure. The adverse argument is, in effect, that because there has been an election in form, the court may not inquire whether there has been an election in law. Because a title to an office is asserted as the result of an election, the pre-existing title of an incumbent in the same office becomes merged in the form of such election, and is hence no longer a subject of judicial inquiry in the courts.

Having assumed the point in dispute, viz., that there has been an election, the definition of the word "contest" is made the basis for the conclusion that this is a case of contested election.

But, it is said, even if this be not a case of contested election, the subject of the right or office in dispute is cognizable solely by the political department of the State government. Hence, it is said the court below has, and had, no jurisdiction to entertain the subject of the information. Whatever the determination of the General Assembly may be, even though, as in the case now under consideration, one branch of the

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Assembly determines in favor of one claimant, and the other branch in favor of the other, it is said the judgment of the General Assembly is conclusive on the courts, and the people, in a case like this. The argument is, that an exposition by the courts of the law of the case would be to subordinate the supreme will of the Legislature,—would be an encroachment upon its prerogative.

The argument addressed to this feature of the case derives its force mainly from the alleged impotency of the court. Whatever its judgment may eventually be, it is said, it possesses no power to enforce its mandate, and hence its jurisdiction would be futile. The assumption is, that under our system of government, official station may be of such quality and degree that all inquiry into the title or pretence of one who asserts a right or claim to such station, is denied the judicial department.

In respect to this assumption, an author, distinguished for his learning, has said: "There is a basis of truth in this argument: the executive of the State can not be subordinated to the judiciary, and may, in general, refuse obedience to writs by which this may be attempted. But when the question is, who is the executive of the State, the judges have functions to perform, which are at least as important as those of any other citizens, and the fact that they are judges can never be a reason why they should submit to a usurpation. A successful usurpation of the executive office can only be accomplished with the acquiescence of the other departments; and the judges, for the determination of their own course, must, in some form, inquire into or take notice of the facts." Cooley Const. Lim. 786. High Extraordinary Legal Remedies, section 634; *Kerr v. Trego*, 47 Pa. St. 292.

It has been contended, in effect, that this is an application to the court to determine who shall preside over the Senate, and that because that body is a branch of an independent department of the State government, it has the inherent and exclusive right to determine that question for itself. That

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if it determines that the relator has the right, it is possessed of ample power, without the aid of the court, to protect him in its enjoyment, and if it is the pleasure of the Senate that the respondent should preside, it is not in the power of the court to subordinate its will. The argument is specious, but it rests on a misapprehension of the case as it appears upon the record. The court is not asked to confer a right upon, or create a title in, the relator; nor is it asked to determine who shall preside over the Senate. The case proceeds upon the theory that the Senate, in the exercise of its constitutional prerogative, has conferred the right upon the relator, and that the respondent is unlawfully interfering with the right so conferred, and still recognized as existing, by the body which conferred, and had the power to confer, the right. The judgment of the court in this, as in all other controversies concerning the rights of parties, can not create the right in one, or destroy it in the other. The rights of each are fixed by the Constitution, and the jurisdiction of the court is invoked, as the mere instrument of the Constitution, to ascertain and declare their rights as they are.

The office of the court in all controversies is, not to create rights, but to ascertain and enforce them when ascertained. In this respect the case is not different from any other controversy between parties, involving rights of property. Nor is the jurisdiction of the court to be determined by the situation of the parties, or their ability to enforce their respective rights, without the aid of the court. Because a controversy has arisen between two individuals, involving the right or franchise to preside over the Senate, in no legal sense involves the Senate, as a legislative body, further than such controversy may affect the dignity and decorum which should attend its sessions. The Senate has no more power to adjudicate, except provisionally, upon an existing legal right or title of its presiding officer, than it has upon the legal rights of any other individual. Grant that the Senate has the

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power, as it doubtless has, to refuse to permit its chamber to be made the arena in which to settle the disputed right or title, by such means as may seem available to the parties, does it follow that either party is forever precluded from invoking the judgment of the law upon the right in dispute? The General Assembly can not, nor can either branch of it, act judicially upon the right in dispute. Suppose it be true, as is claimed on the one hand, that the relator is presiding over the Senate without authority of law and in open defiance of the lawfully expressed will of the people, will it be said that because he does so with the concurrence of the Senate, and under the protection of its officers, the respondent's right is destroyed, unless he establish it by force? Must the right be forever abandoned without judicial examination? Or suppose it be true, as is asserted on the other hand, that the respondent, in defiance of law, being supported by the House, intrudes into, and interferes with the constitutional rights of the relator, are the parties without other means of settling their rights under the law, except it be to set their respective supporters in array?

The right must remain in perpetual dispute until some tribunal, which has authority to pronounce judgment on the case, declares in favor of one party or the other. The law is without force or efficiency until vitality is breathed into it through the judgment and process of the court. Until the court speaks the judgment of the law, the contest must proceed by methods extra-judicial, unless one party or the other abandon his claim. Shall the court, the exponent of the law, though formally invoked, refuse to speak, while the unseemly contest goes on? Or must it first inquire whether the party against whom it may declare, will obey the voice of the law before it makes response?

It can not be admitted or shown that the parties are reduced to this extremity. The same Constitution which conferred the right, wherever it may be lodged, has provided the remedy for its protection. That instrument requires that

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- “All courts shall be open; and every man, for injury done to him in his person, property, or reputation shall have remedy by due course of law.” Authority to adjudge the disputed claim having been lodged in no other tribunal, the courts must declare the law, and then it becomes the duty of the Chief Executive, under the sanction of his oath, to “take care that the laws be faithfully executed.”

Whenever it becomes a question whether or not there was a vacancy to be filled by an election or appointment, or where the question is, did the law authorize the election or appointment in a given case, it is universally held that the courts have jurisdiction to determine the law of the case. There is no authority which holds to the contrary. *Commonwealth v. Meeser*, 44 Pa. St. 341; *Prouty v. Stover*, 11 Kan. 235; *State v. Francis*, 26 Kan. 724; *Page v. Hardin*, 8 B. Mon. 648.

A decision by the Legislature, that a constitutional office is vacant, can not destroy the pre-existing title of an incumbent.

The question presented by the record, and questions closely analogous, have been the subjects of adjudication in the courts of last resort in some of the States, as well as in the Supreme Court of the United States. Uniformly, the jurisdiction of the courts to determine the title to an office is maintained, unless the right to determine such title has been expressly confided to some other tribunal. The person claiming such a vested right may invoke the aid of the court, to ascertain and protect his right, against any one who unlawfully assails it. Thus, in the case of *Marbury v. Madison*, *supra*, which involved the right of the court to coerce the delivery of a commission by the head of one of the departments of the Federal government, through which it was claimed an individual had secured a vested right in an office, Chief Justice MARSHALL said: “If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it can not be pretended, that his office alone exempts him from being sued in the ordinary

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mode of proceeding, and being compelled to obey the judgment of the law. * * * It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing the mandamus is to be determined."

The proceeding here is not against the respondent as an officer, but because, it is alleged, he unlawfully assumes to act as such, to the injury of another, who claims the right. Being sued as an individual who is wrongfully attempting to exercise the functions of an office, he may not cover himself with the mantle of the office in dispute, and in that character claim that he is so related to a co-ordinate branch of the government that all judicial inquiry must be suspended. *Attorney General v. Barstow*, 4 Wis. 567; *Cunningham v. Maccon, etc., R. R. Co.*, 109 U. S. 446; *United States v. Schurz*, 102 U. S. 378; *United States v. Boutwell*, 17 Wall. 604; *Kendall v. Stokes*, 3 How. 87; *Bates v. Clark*, 95 U. S. 204; *United States v. Lee*, 106 U. S. 196; *Poindexter v. Greenhow*, 114 U. S. 270; High Extraordinary Legal Remedies, sections 634, 635, and notes.

Whether the court below properly entertained jurisdiction of the subject-matter of the information, can only be determined by inquiring whether the election held in November, 1886, for Lieutenant-Governor, was or was not a valid election. If the election was authorized by the Constitution and laws, then the votes of the electors communicated a title to the office of Lieutenant-Governor, to the respondent, which can neither be impeached nor inquired into save by the General Assembly.

If the election was not authorized by law, then in legal contemplation there has been no election, and the pre-existing title of the relator can not be involved in a case of contested election. His title, in that event, is the subject of adjudication in the courts. *Matthews v. Board, etc.*, 34 Kan. 606.

Article 5 of the Constitution, entitled "Executive," creates two offices, or public stations, and makes provision for

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the election of three officers. The offices created embrace the duties of the Chief Executive of the State, and those of the President of the Senate. The officers for whose election and service provision is made, are entitled respectively, Governor, Lieutenant-Governor and President of the Senate. These stand related to each other so as to supply an order of succession. The first two are elected by the people, and are each to hold their office during four years. The third is to be elected by the Senate, whenever the occasion may require. While the officer entitled Governor fills the Chief Executive office, the one entitled Lieutenant-Governor is, so long as he is able to attend, *virtute officii*, President of the Senate. While the Lieutenant-Governor presides over the Senate, he who may become President is a senator. In the absence of the one next above, the one next below succeeds to his duties. In respect to the first two, the plain implication is, that when one is chosen the other must be. This inference arises from the manner in which the elector is required to designate for whom he votes, and from the manner of the return, canvass and publication of the vote. The official term of both is fixed alike, the beginning and ending thereof being fixed for all time. The duties which pertain to the office of Chief Executive are prescribed, and provision is made, that in case of the removal from office of the Governor, or of his death, resignation, or inability to discharge the duties of the office, the same shall devolve on the Lieutenant-Governor. Section 10 also enjoins upon the General Assembly to provide by law for the case of removal from office, death, resignation, or inability, both of the Governor and Lieutenant-Governor, and to declare what officer shall then act as Governor. The officer so to be declared is then to act accordingly, until the disability be removed, or a Governor be elected. It is provided that the Lieutenant-Governor shall, by virtue of his office, be President of the Senate, with the right to join in debate, and vote when the Senate is in committee of the whole, and to give the casting vote when

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the Senate is equally divided. Such other duties as are annexed to the office of President of the Senate arise by parliamentary law. The duties thus assigned to the Lieutenant-Governor are precisely those which parliamentary law assigns to the presiding officer or speaker of a legislative assembly. Cushing Par. Law, sections 306-310. Section 11 provides that whenever the Lieutenant-Governor shall act as Governor, or shall be unable to attend as President of the Senate, the Senate shall elect one of its own members as President for the occasion.

Thus it will be seen that the 5th article of the Constitution has created the executive office, divided it into official terms of four years each from a given day, and provided that the tenure of those who may fill the office, or discharge its duties, shall be four years. It has also created the office of President of the Senate, and designated the manner in which it shall be supplied with an incumbent. It has made provision for the election of three constitutional officers, to the end that two constitutional offices may be constantly, and without interruption, supplied with incumbents. Two of the officers are to be elected concurrently, by the electoral body at large, every four years. The election of the third may or may not be held in abeyance, until the occasion for his election arises. When the occasion arises he is to be elected by the Senate. The inquiry then is, how may the occasion arise, which requires the election of the third officer for which the Constitution has made provision, and what are to be his official duties when he is called into being?

Provision having been made for three officers, while concurrent duties were prescribed for but two, the inference arises at once, that the framers of the Constitution deliberately contemplated that emergencies might arise, in which a supernumerary officer would be necessary, in order to secure the discharge of the duties pertaining to the executive department. It is at once apparent that an order of succession was accordingly arranged, so as to prevent the possibility of a

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vacancy during any of the executive terms into which the future had been divided. Contemplating the possible removal from office, or the death, resignation, or other disability of the Governor, and to the end that the executive office might not thereby become vacant of a constitutional incumbent, it was provided that upon the happening of any such event, the duties of that office should at once devolve upon the Lieutenant-Governor. This provision made it impossible that the succession in the office of Governor should ever be broken during an executive term, or the office become vacant while there remained a Governor, or Lieutenant-Governor qualified to act.

Foreseeing, moreover, that in the event the Lieutenant-Governor should be required to assume the functions of Governor, he would be unable to perform the incompatible duty of acting as President of the Senate, and realizing that the Lieutenant-Governor might be unable to attend as such President by reason of death, resignation, or other cause, the framers of the Constitution ordained that it should be the duty of the Senate to elect a President *pro tempore*, for any such occasion. This was to the end that a qualified person might be at hand, or might at once be supplied, when the occasion demanded, who should be clothed with the power to discharge the duties which by the Constitution were assigned to the Lieutenant-Governor in virtue of his office.

Thus it will appear, by attending to the constitutional scheme, that there never can be a moment, during any quadrennial period, when the Constitution itself has not supplied an officer, qualified to discharge the duties assigned to the Governor, or Lieutenant-Governor, without calling for the intervention of the electoral body.

In the character of Lieutenant-Governor, that official is required, during the inability, whether temporary or continuous, of the Governor to discharge the functions of the executive office; while during any like inability of the Lieuten-

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ant-Governor to act as President of the Senate, the duties of that station are devolved upon the President *pro tempore*.

Still further, the article of the Constitution which makes provision for the succession in the executive office, contemplates the possibility that both the Governor and Lieutenant-Governor may at the same time be disabled from discharging the functions of their respective stations.

So far attention has been given to the precautions taken in order that a vacancy might not occur, in the event of the death or disability of one or the other of these two officers. As it seems to fortify the conclusion that in no event was it contemplated that an election should intervene during the progress of an executive term, it may be well to consider briefly the other contingency provided for. What was deemed necessary in the event of the death, resignation or inability of both Governor and Lieutenant-Governor? Was it contemplated that a vacancy would or might then occur in both offices? Clearly not. This is apparent from the fact that the General Assembly was enjoined to declare what officer should, in such an emergency, act as Governor. And why not, in the event of the death or resignation of both, also declare who should then be Lieutenant-Governor? Plainly because the only duties annexed to that office pertained to the Senate, and, therefore, in the next succeeding section, to the Senate was committed the duty, in any and every contingency, of supplying a person to perform those duties. There was hence neither necessity for, nor propriety in, an injunction that the General Assembly should declare by law who should act as Lieutenant-Governor, in case of the death or resignation of that officer. The duty of supplying a person to perform the functions of that office was to be, and was, committed without limitation to the Senate, by requiring the election of a President *pro tempore*, as often as occasion might require.

In pursuance of the constitutional mandate, the General Assembly provided in section 5559, R. S. 1881, as follows: "In case, by the removal from office, death," etc., "of both

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Governor and Lieutenant-Governor, a *vacancy occurs in the office of Governor*, the President of the Senate shall act as Governor until the vacancy be filled; and if there be no President of the Senate, the Secretary of State shall convene the Senate for the purpose of electing a President thereof."

It thus appears that the Constitution, and also the legislation which followed in obedience to its requirement, indicate that the only account which was to be taken of the death, resignation or other inability of the Lieutenant-Governor was, that if the Senate had not already done so, it should then elect a President *pro tempore*.

It follows from a proper construction of the Constitution, that there can be no vacancy in the office of Governor or Lieutenant-Governor, so long as either remains qualified to act. Upon the death or disqualification of both, the Constitution contemplates that a vacancy may occur in the executive office alone. To meet such a possible emergency, it required the General Assembly to declare by law what officer should then act as Governor. This has been done accordingly. The confusion in which the situation is involved grows out of an attempt to confound names with things, titles with offices. It seems to be supposed that the duties and office of Lieutenant-Governor and President of the Senate, which, in virtue of his office, the Lieutenant-Governor may or may not fill, depending on circumstances, can only be filled by supplying some one to act therein with the title of Lieutenant-Governor. This is the fundamental error which underlies the appellant's case. An office, without a legally authorized incumbent, is not filled by merely employing a given title, nor can an office become legally vacant while the Constitution supplies an incumbent who possesses all the other requisite qualifications, except the title. It is the substance and not the shadow, the legally elected and authorized incumbent and not the title, that fills the office. In case of the death or resignation of the Governor, the executive office becomes, for the time being, titularly vacant. It does not, however,

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while there is a Lieutenant-Governor, become vacant in fact. In case the Lieutenant-Governor acts as Governor, or in case of his death or resignation, the office of President of the Senate is, in respect of the name, vacated by the Lieutenant-Governor, but it no more becomes vacant in fact than does the office of Governor in the case first supposed.

The framers of the Constitution were not so much concerned that there should always be two persons supplied with the title of "Governor" and "Lieutenant-Governor," respectively, as that there should always be at hand two persons, legally qualified to discharge the respective duties of Chief Executive and President of the Senate. As was pertinently said in the case of *Chadwick v. Earhart*, 11 Oregon, 389, "It is not shown how an office can be vacant and yet there be a person, not the deputy, or *locum tenens*, of another, empowered by law to discharge the duties of the office and who does in fact discharge them. It is not explained how, in such a case, the duties can be separated from the office, so that he who discharges them does not become an incumbent of the office. * * It is the function of a public officer to discharge public duties. Such duties constitute his office. Hence, given, a public office and one who, duly empowered, discharges its duties, and we have an incumbent in that office."

In New York a law was passed establishing the office of superintendent of insurance. The superintendent was to be appointed by the Governor for the term of three years, with authority to designate his deputy. The deputy was to possess the powers and perform the duties attached by law to the office, during the absence and inability of the principal. The superintendent resigned his office. The Court of Appeals, speaking of the status of the former deputy after the resignation of the superintendent, said: "It thus appears that the statute confers, in the case of a vacancy, upon the deputy all the powers, and imposes upon him all the duties, of the office of superintendent during its continuance. In short, it makes

him to all intents and purposes acting superintendent for that time during which there is and can be no other superintendent. The act contemplates that there shall at all times be a person clothed with all the powers and subject to all the duties of the office of superintendent." *People, ex rel., v. Hopkins*, 55 N. Y. 74.

So it may be said here, the executive department of the State is fashioned upon such a scheme, as that each executive term consists of four years, each term having a definite beginning and ending. The electoral body designates at quadrennial elections two persons, one of whom acquires an absolute right to be Chief Executive for four years. The other becomes a contingent, to act in case of the inability of the first named. Meanwhile the Constitution assigns certain duties to the contingent, connected with the Senate. The Senate is authorized and required to supply a contingent for the Lieutenant-Governor, to discharge the duties assigned him in case of his inability to attend as President of the Senate, and thus the Constitution contemplates that there shall be a contingent to the Governor and one to the Lieutenant-Governor, each clothed with all the power, and subject to all the duties of the principal officer.

The argument in support of the validity of the election has its foundation on section 18 of article 5 of the Constitution. This section provides, among other things, that when at any time a vacancy *shall have occurred* in any State office, the Governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified. Learned counsel in support of their position say: "We maintain * * that the constitution does contemplate vacancies in the office of Lieutenant-Governor. We say it is a 'State office' within the meaning of section 18, and that when a vacancy occurs, it being a State office, it is entirely competent—nay, it is the duty of the Governor—to appoint a Lieutenant-Governor to serve until a successor can be elected."

In my opinion this position is wholly untenable. There

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is nothing in the Constitution which so much as raises an inference that the office of Lieutenant-Governor can become vacant, in a legal or actual sense. Nor is the Constitution fairly capable of such a construction as would authorize the strange anomaly of a Chief Executive appointing to office one who might by his voluntary act succeed to the executive office the next day after the appointment was made.

The confusion arises out of the fact that the office, and the duties which pertain to it, are spoken of as entirely distinct, whereas they are inseparably connected.

It is only where there is an existing office, without an incumbent lawfully authorized to discharge its duties, that the office is, in the eye of the law, vacant. The very idea and definition of the word "office" implies the right to exercise a public function or employment. The inevitable, logical conclusion, therefore, is, that whenever there is an existing office, the duties of which the law devolves upon a person or officer named, upon the happening of any given event, the person or officer so designated becomes, upon the happening of the event named, the incumbent of the office. This is so not because the person becomes *eo nomine* the officer, but because, while lawfully in the discharge of its duties, he fills the office. There was, therefore, assuming the facts stated in the information to be true, two insuperable obstacles to the appointment by the Governor of a Lieutenant-Governor, when General Manson vacated the office. One was, the office was not vacant, because the relator had been elected, and was then President *pro tempore* of the Senate. The other was, that the Constitution made provision for supplying the office, if it was not already supplied, by an election by the Senate.

In *Clark v. Irwin*, 5 Nev. 111, 128, the court says: "Two things must then concur: There must be a vacancy, and no provision made by the Constitution, or no existent law for filling the same, before the Governor can exercise the appointing power."

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Neither of the foregoing conditions was present. As was, in effect, said in the case last above cited, if there was a vacancy, then the very Constitution which created the office filled the same, and there was no such condition of things as authorized an appointment. An executive system in which the Chief Executive could, in any event, appoint his own successor apparent, thereby vesting such appointee with power to become President of the Senate, has, in my opinion, found no precedent in our form of government, either State or National.

The argument is, that a vacancy in the office of Lieutenant-Governor having occurred, such vacancy was to be filled first by appointment by the Governor, and then by the electoral body in November, 1886, under the provision of section 4678, R. S. 1881. This section provides that a general election shall be held in the month of November biennially, at which all existing vacancies in office shall be filled unless otherwise provided by law. It is said there is nothing in the Constitution which forbade the people to fill the vacancy in the office of Lieutenant-Governor.

To this there are three sufficient answers:

1. There was no vacancy.
2. If there was, the Constitution provided a mode of filling it other than by the electoral body, viz., by the election of a President *pro tempore* of the Senate.
3. The Constitution by the clearest implication forbids an election for Governor or Lieutenant-Governor, except for the term of four years, which term can in no case commence at any other than the times specified in that instrument.

It is argued that the election, if lawfully holden, could only confer title for the unexpired executive term. This construction reduces the office of Lieutenant-Governor, the term of which is fixed in the Constitution at four years, to the level of offices created by legislative enactment, and subjects the office by judicial interpolation, rather than by construction, to the operation of section 5567, R. S. 1881, which provides

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that "Every person elected to fill any office in which a vacancy has occurred shall hold such office for the unexpired term thereof." It has, however, been repeatedly held by this court, that this statute has no application to an office created by, and the term of which is fixed in, the Constitution. *Governor v. Nelson*, 6 Ind. 496; *Baker v. Kirk*, 33 Ind. 517; *State, ex rel., v. Long*, 91 Ind. 351.

It must, therefore, be regarded as the settled law of this State, that when a person is elected to an office created by, and the term of which is fixed in, the Constitution, such election confers an indefeasible title for the full constitutional term.

The emphatic language of the Constitution is: "There shall be a Lieutenant-Governor, who shall hold his office during four years." The construction contended for would in effect require the court to add: "Except in case of an election to fill a vacancy, when he shall hold only during the unexpired term of such office." To do this, is equally beyond the power of the court and the Legislature. *People v. Burbank*, 12 Cal. 378. If it is competent by construction thus to add to the Constitution, the enactment of section 5567 was wholly unnecessary, as the provisions of that section could as readily have been interpolated into the statute by construction as into the Constitution. That the Constitution makes no provision for elections to fill vacancies in the office of Governor or Lieutenant-Governor, or for the limitation of the terms of persons elected to fill vacancies in those offices, is conclusive that no such vacancies were contemplated.

Among other objections to the construction thus given the Constitution, and which has, again and again, been given it in the administration of the executive department of the government, it has been contended that there would result an irreconcilable conflict between sections 8 and 10 of article 5. The first provides that no person holding any office under the government of the United States, or of this State, shall fill the office of Governor or Lieutenant-Governor. The sec-

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and provides that in case of the death or disability of both Governor and Lieutenant-Governor, the General Assembly shall declare what officer shall then act as Governor until the disability be removed. It is said that to declare that another officer of the State shall act as Governor in such a contingency, is a violation of section 8. The framers of the Constitution can not be involved in such contradiction. The scheme of the Constitution does not contemplate that either the Lieutenant-Governor or the President of the Senate shall in any event discharge the functions of two incompatible offices. When the Lieutenant-Governor acts as Governor, or fills the executive office, he does so in the character of Lieutenant-Governor, and ceases for the occasion to be President of the Senate. When the President *pro tempore* of the Senate acts as President, he does so in the character and office of Senator, and does not become in name Lieutenant-Governor. The office of President of the Senate is for the time being appendant to that of Senator. When, however, the contingency arises that the President of the Senate is to act as Governor, he does so in his natural, and not in his official, capacity as Senator. He ceases for the occasion to be Senator. This is according to the principle declared in *Chadwick v. Earhart, supra*. It is there said: "If an office be appendant, as the expression is in 1 Leon. 321, to another office, the determination of the first office will determine the second. * * * On the contrary, if the nomination or appointment to an office be by *descriptio personarum* of one who holds some office by the title of which he is described, and who on some contingency is to enter and fill another office, the answering the description at the time the contingency arises designates him as the person who is to enter and fill the office, and when, as thus designated, he enters into the office, he holds it in his natural, and not in his official capacity."

The application of this principle results in dissipating all of the supposed incongruities in the constitutional provisions, to which reference has been made.

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The same reasoning by which it is sought to prove that the office of Lieutenant-Governor becomes vacant upon the death or resignation of that officer, would, if valid, prove that under like circumstances the office of Governor also becomes vacant. It would also prove that when the Lieutenant-Governor, by reason of the death or resignation of the Governor, acts as Chief Executive, the office of Lieutenant-Governor becomes vacant. Yet it is conceded that in such a case the latter office does not become vacant, and that the Lieutenant-Governor, while filling the office of Governor, does so as, or in the character of, Lieutenant-Governor.

Will it be pretended that while acting as Governor in such a case, the Lieutenant-Governor actually fills two offices, that of Chief Executive and President of the Senate? or does he fill the one in fact and the other in name, by his title?

In 1861, after the Governor-elect resigned, and the distinguished citizen who as Lieutenant-Governor supplied the executive chair, assumed the duties of the Executive, he as actually and effectually vacated the discharge of any official duty in any other office than that of Governor, as though he had died on the day he assumed the executive function.

It was absolutely certain that from thenceforth, during the remainder of the executive term, he would be disqualified, and unable to preside over the Senate. Did the office of Lieutenant-Governor thereby become vacant? Should there have been an election for Lieutenant-Governor holden in 1862, while Governor Morton was actually filling the executive chair in the character of Lieutenant-Governor, so as to have supplied the State with two Lieutenant-Governors, or was the office of Governor, while it was thus so adequately and actually filled, vacant, so that there should have been an election to supply that office? Perhaps it is well that the question which now perplexes the affairs of State, was then not so much as even suggested, to add confusion to the crisis which was then upon the people.

Consider the situation in which the affairs of the State are

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involved at this moment. The General Assembly, which it is asserted is the only body capable, and authorized to decide the pending controversy, consists of two wholly independent bodies. The Senate has decided for itself, that the right and title to the office in dispute was conferred by its election on the relator; while the House has given its judgment, that the election, the result of which was declared by its Speaker, conferred the title on the respondent. Each separate branch of the General Assembly has given its judgment on the case. The result of the judgment of the General Assembly is, to present to the people of the State two persons contending for one office, each supported by the judgment of one separate branch of the legislative department of the State. In this extremity the court is appealed to by one of the parties and asked to expound the Constitution and declare the law in respect to his claim of title to the office in dispute. Shall it now be said, that the best and only judgment which, under the Constitution, the law can give in the premises, is that which has been declared by the General Assembly? Is the extremity such that the confusion which now distracts the public service must continue until one or the other of the claimants tires of the contest, or abandons his claim, or may the court, in this as in any other case of disputed right, declare the law?

On behalf of the appellant, it was contended that the issuance of an injunction, in a case like this, was in excess of the jurisdiction of the court. After a careful consideration of the subject, I am constrained to concur in this view.

Without elaborating, my conclusion is, that all that a court can properly entertain in a case involving the title to an office, such as that in controversy, is some appropriate proceeding to determine the right in dispute. Its jurisdiction is limited to giving judgment on the naked legal right. So long as the title remains unsettled, it is not the province of the court to interfere by the extraordinary remedy of injunction

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for the protection of one, or the restraint of the other, litigant. This principle is peculiarly applicable to the case before us, which involves a right to exercise an office which can only be exercised under the supervision and protection of a co-ordinate branch of the government. While the legislative department has no power to pass judicially upon the title involved, each House when separately assembled, or the joint assembly of both, has the power and the right to maintain its own dignity, and the good order and decorum of its proceedings. For this purpose, when the right to preside is in dispute, each may, and must, determine provisionally, until the right is judicially settled, who shall preside over its deliberations. Hence, while the courts are under the solemn duty, when their jurisdiction is properly invoked, of determining the title, they may not, in a contest of such gravity, interpose their authority in a matter which concerns the propriety of the conduct and proceedings of the Senate, or joint assembly of the two Houses.

So far as the relator has invoked the jurisdiction of the court by an information, the proceeding is appropriate, to the end that the title to the office in dispute may be judicially determined. *Cochran v. McCleary*, 22 Iowa, 75.

The feature of the case which invokes the restraining power of the court can not, in my opinion, be entertained. *Beal v. Ray*, 17 Ind. 554; *Smith v. Myers*, *supra*.

For these reasons, while I think the court had jurisdiction of the subject-matter, the restraining order should nevertheless be dissolved, and the further order of the court should be that unless the respondent waives the question of jurisdiction over his person, the pending case should be dismissed.

Howk, J.—My judgment yields a ready and earnest assent to each and all of the conclusions of MITCHELL, J., upon each and all of the momentous questions discussed by him, in this important cause. I can not say aught which would

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give additional force to his able and exhaustive arguments upon each of these questions. Therefore, I content myself with earnestly concurring in his opinion.

Filed Feb. 23, 1887.

INDIVIDUAL OPINION.

NIBLACK, J.—I concur with the conclusion reached in this case, that, upon the facts disclosed by the record, the court below had no jurisdiction over the person of the appellant, and that, for that reason, if for no other, the judgment appealed from ought to be reversed.

I also agree that, having reached the conclusion that there was no jurisdiction over the person of the appellant, there is nothing we can say on the merits of the controversy which can properly be considered as of binding authority as a decision in the cause. But I trust that, under the circumstances, it will not be deemed inappropriate for me to express some individual views on some of the questions discussed by my brother judges who have preceded me.

I am further of the opinion that the court below did not have, and could not be made to have, any jurisdiction over the subject-matter of the action.

Sections 4, 5 and 6, of article 5, of the present Constitution of this State, as they are known by their original numbers, are as follows :

“Section 4. In voting for Governor and Lieutenant-Governor, the electors shall designate for whom they vote as Governor and for whom as Lieutenant-Governor. The returns of every election for Governor and Lieutenant-Governor shall be sealed up and transmitted to the seat of government, directed to the Speaker of the House of Representatives, who shall open and publish them in presence of both Houses of the General Assembly.

“Section 5. The persons, respectively, having the highest number of votes for Governor and Lieutenant-Governor shall be elected ; but in case two or more persons shall have an

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equal, and the highest, number of votes for either office, the General Assembly shall, by a joint vote, forthwith proceed to elect one of the said persons Governor or Lieutenant-Governor, as the case may be.

“Section 6. Contested elections for Governor or Lieutenant-Governor shall be determined by the General Assembly, in such manner as may be prescribed by law.”

These provisions of the Constitution, as I believe, confer upon the General Assembly of this State exclusive power and control over: *First.* Acting in part through the Speaker of the House of Representatives, who is charged with the duty of opening and publishing the returns, the matter of computing the votes cast at any election for Governor and Lieutenant-Governor respectively, and of determining and declaring the result arrived at by such computation. *Secondly.* The matter of electing both the Governor and Lieutenant-Governor when, by reason of a tie in the votes cast, there has been no choice by the people. *Thirdly.* All matters of contest arising out of the alleged election of any person either as Governor or Lieutenant-Governor, and, consequently, all questions affecting the rights of any person to hold the office of either Governor or Lieutenant-Governor.

The phrase “contested elections” has no technical or legally defined meaning. An election may be said to be contested whenever an objection is formally urged against it which, if found to be true in fact, would invalidate it. This must be true both as to objections founded upon some constitutional provision as well as upon any mere statutory enactment.

The primary meaning of the verb “to contest” as given by Webster is, “To make a subject of dispute, contention, or litigation; to call in question; to controvert; to oppose; to dispute.” It is further defined as meaning, “To defend, as a suit or other judicial proceeding; to dispute or resist, as a claim, by course of law; to litigate.” The power, therefore, to determine “contested elections” for Governor or Lieutenant-Governor necessarily carries with it jurisdiction

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over every possible objection which may, under the Constitution or any statute, be urged against the so-called election of any person to either one of those offices. Section 4743, R. S. 1881, and the next three succeeding sections, prescribing the manner of proceeding in contesting the election of State officers, were evidently intended to carry into effect the provision of the Constitution concerning contested elections for Governor and Lieutenant-Governor, but the subsequent section 4756, which states generally the causes for which an election may be contested, does not specifically enumerate the objection presented in this case against the validity of the election of the appellant as Lieutenant-Governor, as a cause of contest, and it is for this reason claimed that the General Assembly has no jurisdiction to hear and determine such a contest as the complaint in this case was intended to present, and that hence, there being no other remedy, the courts must have jurisdiction to hear and determine such a contest. This does not by any means follow. As applicable to a tribunal having only statutory jurisdiction to hear and determine a contested election case, the claim might have much plausibility, but, as applicable to a tribunal upon which the Constitution has conferred complete jurisdiction, such a claim can have no foundation.

It must be borne in mind that the Constitution says that "Contested elections for Governor or Lieutenant-Governor *shall* be determined by the General Assembly." This is equivalent to saying that all such contested elections *must* be so determined. The failure, therefore, of the General Assembly to provide that a particular state of facts which, under the Constitution, ought to render an election for Governor or Lieutenant-Governor invalid, shall constitute a cause of contest, is simply a failure on its part to fully meet all the requirements of the Constitution, and, in the very nature of things, no authority is thereby conferred upon the courts to supply the omission.

As I construe the various sections of the Constitution hav-

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ing some bearing on the subject under discussion, in the light of the principles and usages governing American elections, the election of a Governor or Lieutenant-Governor may be contested for causes other than those specifically enumerated in the statute. If the person receiving the highest number of votes should prove to be an idiot or insane, and hence incapable of either comprehending the nature of the oath he would be required to take, or of discharging the duties of the office to which he has been elected, might not such a palpable disqualification be made a ground of contest? So, if the person receiving the greater number of votes, should, after the election, commit some high crime or misdemeanor, amounting to an impeachable offence under the Constitution, if committed after taking office, might not the General Assembly, upon a contest, declare him to be incapable of taking the office?

If there was no vacancy in the office at the time the election was held, or if the vacancy was one which the people were not authorized to fill at that time, could not either one of such facts be brought to the attention of the General Assembly by an elector, under the provisions of sections 4743 and 4744 of the statutes, above referred to, and the validity of the election be thus contested? If not, why not? But however that may be, I, for the reasons given, maintain that, whatever power the courts might otherwise have had to adjudicate controversies arising out of elections for Governor or Lieutenant-Governor, all jurisdiction over such questions has been conferred upon the General Assembly, to be exercised by it in such manner as has been, or may hereafter be, prescribed by law, and that, consequently, the courts of the State are wholly without jurisdiction to determine such controversies. The constitutional provisions, which I have above set out, take this case out of the rules of decision on kindred questions in some of the other States, and render many of the cases cited and relied on in argument totally inapplicable as precedents at the present hearing.

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A careful examination of the Constitution and existing laws will disclose that all that pertains to the returns, and the contesting of the elections for Governor and Lieutenant-Governor, and to the counting in and inauguration of those officers, stands upon a footing different from that of other State officers. The Governor and Lieutenant-Governor receive no commissions as muniments of title to their offices. The only authentic record of any matter relating to their election is found in the journals of the two Houses of the General Assembly. All the State officers, who receive commissions, must have their oaths of office endorsed upon their respective commissions, and certified copies of such oaths must be filed in the office of the secretary of state.

Section 5519, R. S. 1881, prescribes the oath which every public officer of the State is required to take before entering upon the duties of his office. Section 5521 further enacts that "Members of the General Assembly shall take such oath before taking their seats, which shall be entered on the journals; and the Governor and Lieutenant-Governor shall each take such oath, in presence of both Houses of the General Assembly in convention, and the same shall be entered on the journals thereof." Thus it will be seen that every thing having relation to the returns and contests of their elections, to counting them in, and to the inauguration of Governor and Lieutenant-Governor, is wholly committed to the General Assembly, as much so and as exclusively, I respectfully submit, as each House is made the judge of the election, returns and qualifications of its own members. The Governor and Lieutenant-Governor may, for cause, be impeached by the House of Representatives, and tried and removed by the Senate, or may, in common with other State officers, be removed by a two-thirds vote of both Houses. The courts, for the causes stated, have absolutely nothing to do either with inducting the Governor and Lieutenant-Governor into office or with excluding them therefrom, in the first instance, or in getting them out of office after they may

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have forfeited their right to remain in. Under the peculiar structure of our State Constitution, these are political and hence not judicial questions, and are committed to the General Assembly as the chief representative of the political power of the State.

But it is claimed that the case presented is that of two persons claiming the right to discharge the duties of the same office, and that in such a case the statute expressly authorizes a proceeding in the nature of *quo warranto* to settle such a controversy, independently of any provision of the Constitution concerning contested elections for Governor and Lieutenant-Governor. But the appellant bases his claim of right to preside over the Senate upon the assumption that he is the duly elected and qualified, and hence acting Lieutenant-Governor of the State.

The relator of the appellee bases his claim to be recognized as the presiding officer of the Senate, upon the assumption that there is at present a vacancy in the office of Lieutenant-Governor, and that, being a member of that body, he has, under the Constitution, been elected President *pro tempore* of the Senate, which confers upon him the exclusive right of presiding over its deliberations. Each, therefore, bases his claim to preside over the Senate upon a title essentially different from the other.

Conceding all the relator claims, he has not thereby become, in any proper sense, the Lieutenant-Governor of the State. He is still a Senator, and as such entitled to vote upon all questions coming before the Senate. He does not occupy, and, while remaining a Senator, can not be made to occupy, those supernumerary relations to the Senate which are, by the Constitution, imposed upon the Lieutenant-Governor.

There is nothing in the Constitution or laws of this State which prescribes the duties of a President *pro tempore* of the Senate, or confers upon him any fixed tenure of office. Under the parliamentary law, to which we must alone look in the absence of any constitutional or statutory provision on the

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subject, the President *pro tempore* of the Senate is only its presiding officer during the pleasure of that body. He may be removed at any time by a vote of the Senate, or the election of some other Senator to the same position. At all events, his term can not extend beyond the legislative term during which he is elected. Every fourth year, therefore, his term of office must at the utmost expire about two months before the end of the current term of Lieutenant-Governor. On this subject see section 3, article 4, of the Constitution; also section 9, article 5, of the same instrument. Consequently the relator and the appellant can not, with propriety, be considered as claimants to the same office. The points of collision between them are *sui generis*, and do not, as I conceive, present a case either authorizing or requiring judicial intervention.

The condition of things complained of is really one of disorganization between the two Houses of the General Assembly, one recognizing the appellant as the lawfully elected and duly qualified Lieutenant-Governor of the State, and the other denying his title to that office.

This condition of disorganization develops a controversy over which the courts, on general principles, have no jurisdiction, and concerning which no court can exercise even the slightest control. It presents a case for legislative, and, consequently, not judicial arbitrament.

So far as I am able to perceive, the Senate has the unquestionable right to determine who is entitled to act as its presiding officer.

Section 16, article 4, of the Constitution, declares that "Each House shall have all powers necessary for a branch of the legislative department of a free and independent State." This provision is nothing more than an affirmation of the principles of the parliamentary law as applicable to the separate powers and relative independence of the two Houses of a legislative body like our General Assembly.

Each House is entitled to decide every question which falls

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within its own exclusive jurisdiction. When, therefore, there is a contest as to which of two persons is entitled to preside over the Senate, the question, from the very necessity of the situation, becomes one which the Senate must decide. It may, as a matter of abstract law, decide incorrectly, but if it should, I know of no tribunal this side of the ballot-box which is authorized to review its decision. It has all the organization and official force necessary for the enforcement of its own rules and orders, and as much power in that respect as any other tribunal which does not command the military forces of the State. It may, under parliamentary law, punish persons guilty of a contempt of its authority. See Cushing Par. Law, paragraphs 655 and 671. This is, also, recognized as an existing power by sections 14 and 15, article 4, of the Constitution. In short, neither House either needs or is entitled to receive any aid or assistance from the courts in the performance of the various duties which the Constitution has devolved upon it. Then, too, I know of nothing in the Constitution, or in any statute, or prescribed by any rule of parliamentary law, which designates any officer as the person entitled to preside when the two Houses meet in joint convention. The right of a particular person or officer to thus preside might be established by a joint rule of the two Houses, but the complaint in this case makes no mention of such a joint rule. Assuming, therefore, that no such rule is in existence, I have no reason for believing that, when the two Houses assemble in joint convention, an aggregate majority of the body, thus composed, may not call whomsoever it pleases to the President's chair and authorize him to preside for the occasion.

It has most usually been the custom in this State for either the Lieutenant-Governor, or President *pro tempore* of the Senate, to preside on such occasions, but the custom thus most usually observed has not ripened into, or ever been accepted as, a precedent of binding authority. If, therefore, a joint convention may select whomsoever it pleases to preside over

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its proceedings, it is too plain for argument that no court can inhibit the person thus selected from so presiding. I, consequently, know of no principle on which the restraining order granted in this case can be sustained, conceding that the court below had jurisdiction over the person of the appellant.

In response to much that has been said on the subject in argument, I feel quite assured that the Senate of this State is not, like the Senate of the United States, a continuous body. In the Senate of the United States, a majority constitutes a quorum, and as there is always more than a quorum of qualified Senators holding seats in that body, its organic existence is necessarily continuous. But in the Senate of this State two-thirds of its members are necessary to make a quorum. As one-half of its members go out of office at the end of each legislative term of two years, that is to say, on the day after each general and biennial election, it becomes at the end of each such legislative term, a disorganized body, and, as the officers of the Senate comprise an essential part of its organization, it necessarily results that the terms of such officers expire when the body becomes disorganized for want of a quorum. See section 3, article 4, of the Constitution, above referred to. This, of course, includes the President *pro tempore* when one has been elected. Cushing, *supra*, paragraphs 283 and 296.

I might still further enlarge upon some of the views I have thus expressed, but I deem it unnecessary for any practical purpose.

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INDIVIDUAL OPINION.

ELLIOTT, C. J.—It will not, I trust, be thought improper for me to add something to what I have said in the foregoing opinion, for, in that opinion, I spoke for the court, expressing in part, but not in full, my own views. I fully concur in the opinion of my brother NIBLACK, that the courts have no jurisdiction of the subject-matter of this

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action, and as the subject has been by him so fully and so ably discussed little can be added.

I began the investigation of this question with the impression that the courts had jurisdiction of the subject-matter, but I leave it with the firm conviction that they have not. This impression arose from a belief that it is better and safer that such controversies as this should be settled by some other tribunal than the Legislature, but, while still impressed with that belief, I am compelled to yield to the settled rules of the law and the clear words of the Constitution. Whatever may be the views of a court or judge upon a question of constitutional policy, the expressed will of the people, as written in their Constitution, must be obeyed and enforced. I am convinced that the framers of the Constitution have conferred upon the General Assembly exclusive authority over such controversies as this, although, regarded as a question of policy, I am persuaded that it would have been wiser to have entrusted the authority to some other tribunal. The makers of the Constitution had power to vest the authority in the Legislature, and they have done it. To their judgment all must yield.

The grant of power to the Legislature can not be defeated upon the presumption that it will not be justly exercised. On the contrary, it is the duty of the judiciary to assume that legislators will faithfully and impartially perform the duty imposed upon them by the Constitution they have solemnly sworn to support. Courts must accord to the Legislature the same solemn sense of duty, and the same conscientious resolution to perform it, unmoved by improper motives, that they can claim for themselves.

In *Brown v. Buzan*, 24 Ind. 194, it was said: "The judiciary ought to accord to the Legislature as much purity of purpose as it would claim for itself; as honest a desire to obey the Constitution, and, also, a high capacity to judge of its meaning."

It is, therefore, natural and reasonable to conclude that

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the framers of the Constitution, influenced by this principle, believed that the Legislature would impartially hear and determine all controversies, and, acting upon that belief, inserted in that instrument the provision investing the General Assembly with power to determine all contests for the offices of Governor and Lieutenant-Governor.

There was a time in our history when eminent men, statesmen and jurists, believed that the courts had arrogated to themselves a power which did not belong to them, and that its assumption was hostile to the spirit of our institutions. So thought Jefferson, Madison, Jackson, Randolph, Van Buren and Bancroft in the earlier years of the Republic, and so thought Abraham Lincoln in the more recent years. Bancroft's *History of Const.*, II., 198, 202; Garland's *Life of Randolph*, 327; Van Buren's *Political History*, chapter 8; Lincoln's first inaugural address. The illustrious lawyers and statesmen of the early years were leaders of men, and their utterances did much to mould and give tone to public opinion. Their most radical views prevailed with many in their own times, and are advocated by lawyers of our own day. Mr. Street's address before American Bar Association, 1883. The influence of those great men was widespread, and there is no doubt that their views controlled in a great measure the members of the constitutional conventions of the older States, and inspired them with the belief that the public good demanded that bounds be set to the power of the judiciary. Our own conventions, that of 1816 and that of 1851, borrowed from the older States, and, influenced by the same reasons as those which had moved the conventions of those States to limit the power of the judiciary in matters of a political nature, distributed the power by investing authority over controversies respecting the title to the executive offices in the General Assembly.

The members of the convention which framed the Federal Constitution believed that the courts should only decide purely judicial questions. One of the historians of the de-

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bates of that body gives us substantially this account of the action of its members: Dr. Johnson, that historian says, moved an amendment to the provision relating to the jurisdiction of the courts, whereupon Mr. Madison said: He "doubted whether it was not going too far, to extend the jurisdiction of the court generally to cases arising under the Constitution, and whether it ought not to be limited to cases of a judiciary nature. The right of expounding the Constitution, in cases not of this nature, ought not to be given to that department. The motion of Dr. Johnson was agreed to, *nem. con.*, it being generally supposed, that the jurisdiction given was constructively limited to cases of a judiciary nature." 5 Elliott Debates, p. 483.

It is now firmly settled, and, as I believe, wisely settled in accordance with sound governmental policy and true principles of jurisprudence, that the judiciary has power to decide in all cases over which it has jurisdiction, upon the constitutionality of legislative and executive acts, but this just result was only reached after a fierce and stubborn conflict. Judges who asserted this principle were denounced in the bitterest terms in high places and in the public prints. Nor did the attack made upon them end in words. In 1796, during the troublous times in Rhode Island, so well described by Mr. McMaster in his history of the American people, the judges of the superior court were impeached for deciding an act of the Legislature to be unconstitutional, and, although they were acquitted, they lost their offices. In 1806, two of the judges of the Supreme Court of Ohio, Judges TOD and PEASE, were impeached for making a similar decision, but, after a bitter contest, they were acquitted. These contests were the subject of much discussion, and the conduct of the judges was in many quarters wrathfully assailed, and in others stoutly defended. Denunciations of what was asserted to be a tyrannical usurpation of authority rang throughout the land, and many men, some of them great leaders, declared that the power of the judiciary must be confined within narrower

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limits. The strife profoundly agitated the public mind, and its influence was felt in the halls of the conventions, and it led to a limitation upon the power of the courts.

It is always proper to examine the history of the country and study the discussions of the times in order to ascertain the meaning of constitutional provisions. It is, indeed, often necessary to do so, and from these sources light is oftentimes obtained that clears away obscurity and difficulty. Cooley Const. Lim. 81. In this instance history supplies material aid, for it informs us that there was a reason for limiting the power of the judiciary and a purpose to be accomplished in doing it.

A reason urged by some who denied the power asserted by the courts was, that a power so great should not be entrusted to men whose terms of office were for life, as in the earlier years of the Republic were the terms of the judges of the State and Federal courts. It was thought by many, whether justly or not it is not for the judiciary to decide, that it was wiser and better to place the authority of determining contests respecting the right to office in the hands of those officers whose terms of office were not of great duration. Ohio, Kentucky, and other States have taken the entire power from the courts and placed it in special tribunals. Our own court has recognized the general principle that it is often best to entrust high power to officers whose terms are short.

In *Brown v. Buzan*, *supra*, it was said: "Thus, to whatever extent this court might err, in denying the rightful authority of the law-making department, we would chain that authority, for a long period, at our feet. It is better and safer, therefore, that the judiciary, if err it must, should not err in that direction. If either department of the government may slightly overstep the limits of its constitutional powers, it should be that one whose official life shall soonest end. It has the least motive to usurp power not given, and the people can sooner relieve themselves of its mistakes."

This reasoning supplies grounds for sustaining the policy

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of distributing the power of settling contests for office ; for, if that power is lodged in the Legislature, the people can, at short and often-recurring intervals, rebuke where rebuke is needed, and approve where approval is merited.

Another reason given in support of the policy of placing contests for office under the jurisdiction of special tribunals is thus stated by the highest court of Kentucky : "The very purpose of providing these boards was to prevent the ordinary tribunals of justice from being harassed, and indeed overwhelmed with the investigations, and involved in the excitements to which these cases may be expected to give rise." *Newcum v. Kirtley*, 13 B. Mon. 515.

This argument is not without force. The wider the separation between judicial questions and political ones the better, for courts should be kept, if possible, entirely beyond the domain of political controversies. But, this is aside from our path, for it is not for the courts to judge of the strength or soundness of reasons which influenced the framers of the Constitution to enact the provisions there written ; it is quite enough for them to know that there was a reason and a purpose in the minds of the men who wrought the Constitution of the commonwealth.

The power of determining who is, or who is not, rightfully entitled to the chief executive offices of the State, is, indeed, a very high one, and if the courts have that power, then, as they do undoubtedly have it over all other offices, except the legislative, they would have control over all offices save the legislative, and there was, therefore, at least some reason to doubt whether it was wise that they alone should wield a power of such great magnitude. It is, at all events, very evident that the makers of our Constitution deemed it wise to limit the power of the courts by investing the General Assembly with authority to decide all contests involving the title to the two principal executive offices of the State. There certainly are plausible, if not convincing, reasons for a distribution of the high power of determining titles to office,

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since, as has been shown, if it is left wholly in the courts, they are invested with the highest power in the government, and one that some have not hesitated to affirm is autocratic. It is, indeed, claiming very much for the courts to assume that they possess the supreme power to decide all contests involving titles to office, and it is evident that the framers of the Constitution, regarding it as better to divide the power and limit the authority of the courts, placed all contests for the chief executive offices under the jurisdiction of the Legislature.

If it was not intended to take contests involving the title to the executive offices from the judiciary, there would have been no necessity for any specific provision upon the subject, and it can not be inferred that the framers of so solemn an instrument as the Constitution have done a vain and fruitless thing. But the provision is in the Constitution, and it is there for a reason. Because it was deemed wise to divide the power it was written: "Contested elections for Governor or Lieutenant-Governor shall be determined by the General Assembly." The meaning of the word *contested* is neither doubtful nor obscure, as my brother NIBLACK has shown, and as any one may see, by turning to the works of lexicographers. We are to interpret the Constitution by assigning to the words employed their usual meaning. Chief Justice MARSHALL said: "The enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." *Gibbons v. Ogden*, 9 Wheat. 1, 188. Judge COOLEY says: "What a court is to do is to declare the law as written." Cooley Const. Lim. 55.

The Constitution vests in the General Assembly sole and supreme jurisdiction over all disputes, controversies, or questions, whatsoever form or posture they may assume, arising out of a contest for the office of Governor or Lieutenant-

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Governor. The authority is to decide all phases of the controversy, not some part or parcel of it. This is the plain import of the language employed, neither clouded by doubt nor obscured by uncertainty. It is a settled principle that where jurisdiction of a subject is conferred upon any tribunal it has jurisdiction of every part of it, and of every question of law or of fact that can possibly arise from the beginning to the end of the controversy. Once jurisdiction attaches, it exists for all purposes, all questions are within the authority of the tribunal, and no other tribunal in the world has a right to interfere with its decision except where there is a right of review or appeal. The rule rests on a solid foundation, for, if one tribunal might decide one part of a controversy and another some other part, there would be a hopeless confusion that no power could clear away, and a disastrous conflict that no tribunal could reconcile.

If it were conceded that the power to hear and determine contests involving the title to the office of Lieutenant-Governor is purely a judicial power, it would not impair the force of the constitutional provision referred to, for it can not be doubted that the people, in their sovereign capacity and as the source of all power, may invest the Legislature with pure judicial power. They have, indeed, done so in more instances than one. It is a mistake to assume that the Constitution confers power upon the people, for the people's power is primary, original, inherent, and supreme. Constitutions limit, but they do not create, the power of the people. The constitution is the creature, not the creator, of the people's power.

In many instances powers of a judicial nature are conferred upon the Legislature, and it has always been held that where such a power is conferred, it is exclusive and supreme. No other tribunal can share in its exercise, nor can any court control it. *People v. Mahaney*, 13 Mich. 481, 492; *State v. Gilmore*, 20 Kan. 551; *State v. Tomlinson*, 20 Kan. 692; *Dal-*

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ton v. State, 43 Ohio St. 652; *Smith v. Myers*, *ante*, p. 1, and cases cited.

A high tribunal has been established by the Constitution for the trial of contests involving the title to the offices of Governor and Lieutenant-Governor. That tribunal has all authority over the subject or it has none. It is not possible to assume that it may decide some questions, but not all, without contravening the long established rule that jurisdiction over the subject is jurisdiction over every question that can arise. The high tribunal provided by the Constitution is the special one to which all questions arising in a dispute, contest or controversy, involving the title to either of the executive offices, must be submitted. Where exclusive authority is vested in a special tribunal, courts have no jurisdiction to control, supervise or review its decisions.

In *Wright v. Fawcett*, 42 Texas, 203, it was said, in speaking of judicial power: "To decide the result of an election is a question of a different character, 'part of the process of political organization, and not a question of private right.' *Hulseman v. Rems*, 41 Pa. St. Rep. 396, and see *Arberry v. Beavers*, 6 Texas, 469; and *Baker v. Chisholm*, 3 Texas, 157; *Walker v. Tarrant Co.*, 20 Texas, 16. Where the law has provided a mode of deciding cases of contested elections, designed to be final, the courts have no authority to adjudicate such cases, other than that the law may give to them. *Batman v. Megowan*, 1 Met. Ky. 533; *Grier v. Shackleford*, 3 Brevard, 491; *Skerrett's Case*, 2 Parsons, 509, as reported in *Brightly Lead. Cases on Elec.* 320; *Ewing v. Filley*, 43 Pa. St. 389." This principle is again asserted in *Rogers v. Johns*, 42 Texas, 339.

It was decided in the case of *State v. Harmon*, 31 Ohio St. 250, that "The authority conferred on the Senate to try contested elections is not judicial power within the meaning of * * the Constitution." In *State v. Marlow*, 15 Ohio St. 114, a similar principle was declared, the court saying: "Jurisdiction being thus specially conferred upon other tribunals,

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and the mode of its exercise prescribed, it can not be inferred that it was intended by the Constitution to be differently exercised by a proceeding in *quo warranto*, as at common law, or by the Supreme Court and district courts, under a mere general grant of jurisdiction in *quo warranto*."

The Constitution of Arkansas contains this provision: "Contested elections shall likewise be determined by both Houses of the General Assembly in such manner as is or may hereafter be prescribed by law." And the Supreme Court of that State held that a controversy between claimants to the office of Governor must be determined by the Legislature, the court saying: "Under this Constitution, the determination of the question as to whether a person exercising the office of Governor has been duly elected or not, is vested exclusively in the General Assembly of the State, and neither this nor any other State court has jurisdiction to try a suit in relation to such contest, be the mode or form what it may, whether at the suit of the Attorney General, or on the relation of a claimant through him, or by an individual alone claiming a right to the office. Such issue should be made before the General Assembly. It is their duty to decide, and no other tribunal can determine that question." *State, ex rel., v. Baxter*, 28 Ark. 129.

No contest, controversy or dispute respecting the right to an office can ever be determined without deciding both questions of law and fact. Every controversy of a legal nature involves two elements, law and fact, and a tribunal having jurisdiction over the subject must, of necessity, have power to decide both the law and the fact. Without this power no progress could be made, and an adjudication would be impossible. The elements of law and fact which enter into all controversies are so blended and interwoven as to be absolutely inseparable. The law is the arbiter, and the facts invoke its powers. Without law there is no power to decide, for, without it, there would be no rule to determine the force and effect of the facts. On principle, it is plain that juris-

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diction to hear and determine involves power to decide all questions of law and fact. But authority is not wanting.

In *Batman v. Megowan*, *supra*, it was said, in speaking of a special tribunal, that "Its decisions are final on all questions of both law and fact, which may be involved in the investigation of the rights of the claimants to the office in contest."

Courts unhesitatingly decide all questions, whether of law or of fact, in election contests, and, surely, what the courts may do, the high constitutional tribunal, composed of the law-makers of the commonwealth, must do.

It is not necessary to go through the cases, for, beginning with *Waldo v. Wallace*, 12 Ind. 569, it has been the uniform practice to decide all questions of law, the grave as well as the trifling, which the contest involves. This is the rule everywhere, in the legislative halls and in the courts. One of the many examples where Congress decided a pure question of law was that of *Gholson and Claiborne*, decided in 1837, where the question was, as here, the right to hold an election. Contested Election Cases, 9. *Howard v. Cooper*, is another illustration, for, in that case, the question was as to the validity of an election. *Ibid.* 275, 282. In the case of *Grafflin*, of Virginia, the question was purely one of law, and was as to the right to hold an election at the time Mr. Grafflin claimed to have been elected. *Ibid.* 464.

Precedents, however, are not needed, for it can not be conceived that power to determine a contest, dispute, or controversy, means nothing more than authority to determine the facts.

A high tribunal has been designated by the people to determine all contests for the office of Lieutenant-Governor; there the people have placed that great power, and there it must rest until the people in their sovereign capacity shall change their Constitution.

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INDIVIDUAL OPINION.

ZOLLARS, J.—When the questions here involved are examined, it is not at all surprising that the honorable gentlemen, parties to this litigation, have honestly differed as to their rights, and the proper method of having those rights settled. Nor is it at all strange that their able and learned counsel have also differed, both as to the rights and the forum in which those rights are to be ascertained and settled.

The novelty and importance of the questions involved, and the want of entire harmony upon each proposition, have seemed to render it proper for different members of the court to submit their individual views upon some of the questions about which there is a difference of opinion.

At the bottom of the controversy, is the controlling question, as to whether or not the election for Lieutenant-Governor in November last was authorized by the Constitution and statutes of the State. Upon that question the relator, Smith, seeks a decision by the court.

That question, on the other hand, the respondent, Robertson, claims the court can not decide, because it has not jurisdiction so to do:

First. Because it has no jurisdiction over the subject-matter of the controversy; and,

Second. Because it has no jurisdiction over his person.

We are thus met, *in limine*, with the question of jurisdiction.

Jurisdiction is not a question of propriety, policy or choice, but one of power. Jurisdiction is the power to decide. When the question is made, the court must first examine and determine whether or not it has jurisdiction. When it is ascertained that it has not, both the power and the duty of the court are at an end.

When a question is before a court for decision, it is its duty, without hope of commendation or fear of censure, to decide it. And when a court has once determined that it has

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not jurisdiction to decide and adjudicate, it should have the courage, without hope of commendation or the fear of censure, to say so, and to refrain from the expression of an opinion that will be a mere dictum, and from making an adjudication that will bind no one.

An opinion, or an adjudication, without jurisdiction, is a mere *brutum fulmen*, not only not binding on the parties to the suit, but which the humblest citizen of the State may disregard with impunity.

Such adjudications might well tend to destroy that confidence which, it is to be hoped, the people have in the conservatism and integrity of the courts.

The courts are the great conservators of organized society. If, by decisions extra-judicial, or by thoughtless, biased and unjust criticism, the people shall utterly lose confidence in them, then, indeed, shall we be at the beginning of the end, when anarchy shall take the place of order.

The question of jurisdiction, as made here, is two-fold. As I have said, it is insisted by the respondent, Robertson, that the Marion Circuit Court had not, and, hence, this court has not, jurisdiction over his person, he being a resident of Allen county. That he was and is a resident of Allen county, and not of Marion county, is admitted on all hands.

After a careful examination of the question, we all agree, that by reason of his not being a resident of Marion county, the Marion Circuit Court did not have jurisdiction over his person.

Upon that branch of the case I agree fully with what is said by ELLIOTT, C. J.

The respondent, Robertson, might have waived the point of the want of jurisdiction over his person. He did not do so. On the contrary, he insisted, and still insists, upon the objection. The courts can not compel such a waiver. We have no reason to assume, or presume, that he will, in any event, change his attitude in that regard.

The novel and difficult branch of the question of jurisdic-

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tion, which is before us for decision, is, as to whether or not the court had, or has, jurisdiction over the subject-matter; in other words, whether the court had, or has, the power to decide in this case, and as between the parties here litigant, the legality and constitutionality of the election for Lieutenant-Governor in November last. That question has challenged the greatest research, and the best thought of each one of us.

I agree with Judges NIBLACK and ELLIOTT, that in this case, the court has not jurisdiction of the subject-matter. I do not, however, agree with all of the reasoning by which they reach that conclusion.

Upon that question, the arguments of counsel have taken a wide range, involving the structure of the State government, and the checks and balances, as established by the Constitution. It is argued on the one hand, that an adjudication by the courts of the questions here involved, would be an unwarranted interference with, and an unwarranted infringement upon, the duties, functions and prerogatives of the legislative department of the government, by the judicial department.

As applied, simply, to the judicial and legislative departments of the government, as such, the argument, in my judgment, is not sound.

Article 3 of the Constitution, R. S. 1881, section 96, is as follows: "The powers of the government are divided into three separate departments; the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided."

By section 16, of article 4, of the Constitution, R. S. 1881, section 112, it is ordained, that each House of the General Assembly shall have all the powers necessary for a branch of the legislative department of a free and independent State. The primary object, and the proper function of the legislative department of the government, as such, is not to settle

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controversies between citizens, nor to adjudicate upon their rights, whether those rights relate to private property or public office.

The primary object of the department, and its proper function, is to determine upon policy, and to carry that policy, by legislation, into laws. In distinguishing between judicial and legislative acts, the United States Supreme Court in the *Sinking-Fund Cases*, 99 U. S. 700, 761, said: "The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it." So, in the case of *Wayman v. Southard*, 10 Wheat. 1, 46, Chief Justice MARSHALL said: "The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law."

In speaking of the difference between a judicial and legislative act, the Supreme Court of Tennessee, in the case of *Maybe v. Baxter*, 11 Heisk. 682, 690, said: "The one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a pre-determination of what the law shall be for the regulation of all future cases falling under its provisions."

As a member of, and in the convention which framed our Constitution, Judge BIDDLE said: "What is the legislative power? It is that power by and through which a State makes its laws. * * * The General Assembly has no other duty or power than to *make* laws. After a law has been enacted this department has no further power over the subject. It can neither adjudge the law nor execute it."

So far as the legislative department settles, or may settle the State policy, it may properly be called the political department of the government.

The question upon which the relator, Smith, here seeks an adjudication, however, very clearly, is neither a political nor a legislative question. It is not what ought to be done as a matter of State policy, nor what manner of laws ought to be

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passed for future cases, or as a rule of future action. It is purely a judicial question, involving the proper construction of the Constitution and the laws already in existence, upon the question of the term and the election of a Lieutenant-Governor. It is, therefore, not a question that belongs to the legislative or political department of the government as such.

If the Legislature has authority, either concurrent or exclusive, to decide the question, it is not because it is in the legislative department of the government, but because provisions of the Constitution, and statutes enacted in pursuance thereof, other than I have yet referred to, clothe that body with the extraordinary power, which is neither legislative nor political, but judicial. As we have seen, one of the co-ordinate branches of the government is the judicial.

It is ordained by section 1, of article 7, of the Constitution, R. S. 1881, section 161, that "The judicial power of the State shall be vested in a Supreme Court, in circuit courts, and in such other courts as the General Assembly may establish."

This is a general grant of all judicial power to the judicial department of the government, to the exclusion of the other departments, and with appropriate legislation in pursuance of the grant, carries into the courts for final adjudication all judicial questions, unless there are other constitutional provisions lodging judicial power, in certain cases, elsewhere.

The Constitution is the people's; they made it, and they are sovereign. They had the right to lodge the judicial power of the government, which they established, wherever they saw fit. And if we shall find that from the general grant of judicial power to the judicial department, they have, by the same Constitution, carved out a certain portion as to certain cases, and lodged it elsewhere, there is no choice for the courts but to respect and to give force and effect to what they have done, whatever may have been the preconceived notion of the individual judges as to the existence or the propriety of such special grant.

Section 4, of article 5, of the Constitution, provides that "The returns of every election for Governor and Lieutenant-Governor shall be sealed up and transmitted to the seat of government, directed to the Speaker of the House of Representatives, who shall open and publish them in the presence of both Houses of the General Assembly."

Section 5, of the same article, provides that "The persons, respectively, having the highest number of votes for Governor and Lieutenant-Governor shall be elected; but in case two or more persons shall have an equal, and the highest, number of votes for either office, the General Assembly shall, by joint vote, forthwith proceed to elect one of the said persons Governor or Lieutenant-Governor, as the case may be."

Section 5521 of the statutes, R. S. 1881, provides that the Governor and Lieutenant-Governor shall each take an oath of office in the presence of both Houses of the General Assembly in convention, and that the same shall be entered upon the journals thereof.

The two Houses thus canvass the votes for Governor and Lieutenant-Governor, not because they constitute the legislative department of the government, nor because the duties are legislative, but because the Constitution imposes the duty, and clothes them with the power in the way of a special grant.

In my judgment, by the Constitution, the two Houses are constituted a special tribunal, in the nature of a board of canvassers, to open and publish the returns of the votes for Governor and Lieutenant-Governor.

And I do not think that the grant is any broader, simply because it is to the two Houses. I think that in the same words, the grant would have carried with it just as much authority had it been to the State officers, constituting them a special tribunal to canvass the votes for Governor and Lieutenant-Governor, and to make a record of the result. Would such a grant constitute the State officers a judicial tribunal, in such a sense as that their determination upon the returns

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before them would be conclusive as to the validity of the election, and as to the election of the persons declared elected Governor or Lieutenant-Governor?

It is not the publishing of the votes by the Speaker of the House, nor his declaration of the result, that makes the persons voted for Governor or Lieutenant-Governor, but the number of votes received. So the Constitution declares.

Does the grant of power to the two Houses to publish the returns and declare the result, constitute them a judicial tribunal in such a sense as that their determination, and declaration upon the returns before them, are conclusive as to the validity of the election, and as to the election of the persons declared to be elected? I think not. I think that the action of the two Houses in publishing the returns, and in declaring the results, is purely ministerial. They declare the result upon the returns before them, but back of that, there may be a sufficient number of illegal votes to change the result, and the majority candidate may be ineligible. No authority seems to be given to the two Houses, when thus in joint convention, to summon the interested parties before them, to send for, or to examine witnesses as to the illegality of votes, or as to the ineligibility of the persons voted for.

In the State of Wisconsin, the Attorney General, the Secretary of State, and the State Treasurer were by statute constituted a board of State canvassers. As such board, they had the authority, and it was made their duty, "upon the certified statements of elections, made by the board of county canvassers, to examine and make a statement of the whole number of votes given at any such election for the offices of Governor, Lieutenant-Governor, Secretary of State,' etc., * * to certify such statements to be correct, and 'thereupon' to determine the result."

It was held by the Supreme Court of that State, that the duties were not judicial, but purely ministerial. *Attorney General, ex rel., v. Barstow*, 4 Wis. 567 (781). In that case,

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the proceeding was an information in the nature of *quo warranto*, to oust from the office a person who was claiming to be Governor by virtue of an election, and who had been declared elected by the board of State canvassers.

It was contended by Mr. Carpenter, with great ability, learning and research, that the suit could not be maintained: *First*. Because the determination of the board of State canvassers was final; and, *Second*. Because it would be an unwarranted interference with the executive department by the judicial department of the government.

The argument was answered by the court's holding, that the board was not a judicial tribunal, and that the proceeding was not to affect the executive department, but to oust a person who had wrongfully intruded into the office of the Chief Executive. See the comments of Cooley on that case. Cooley Const. Lim. (5th ed.) 624. See to the same effect, also, *Dickey v. Reed*, 78 Ill. 261; *Gass v. State, ex rel.*, 34 Ind. 425.

Clearly, a proceeding by information against a usurper into an executive office, is not an encroachment upon the executive department of the government.

It has been frequently held by this court, that the judiciary may control executive action as to matters purely ministerial. *Governor v. Nelson*, 6 Ind. 496; *Biddle v. Willard*, 10 Ind. 62; *Baker v. Kirk*, 33 Ind. 517; *Gray v. State, ex rel.*, 72 Ind. 567 (577).

And yet this court has steadily maintained the independence of the co-ordinate departments of government, refusing to yield its jurisdiction, and refusing to exercise functions belonging to the legislative or executive departments. *Lafayette, etc., R. R. Co. v. Geiger*, 34 Ind. 185 (196); *Butler v. State*, 97 Ind. 373; *Johnson v. Board, etc.*, 107 Ind. 15 (24), and cases there cited; *Columbus, etc., R. W. Co. v. Board, etc.*, 65 Ind. 427; *Shoultz v. McPheeters*, 79 Ind. 373.

The record of the canvass by the two Houses, of the declaration of the result, and of the oath, is doubtless *prima*

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facie evidence of the election of the persons declared to be elected Governor or Lieutenant-Governor, just as the certificate of election, and the commission issued to other officers, are *prima facie* evidence of their election.

In a collateral proceeding, such record is, doubtless, conclusive evidence of the election, but it is not conclusive in a direct proceeding, authorized by the Constitution and laws; and especially is it not conclusive, as to whether or not there was a valid election under the Constitution and laws. As to the force of decisions by boards of canvassers, and of certificates of election and commissions, see Cooley Const. Lim. (2d ed.) 623; *State, ex rel., v. Shay*, 101 Ind. 36; *O'Ferrall v. Colby*, 2 Minn. 180; *Prince v. Skillin*, 71 Maine, 361 (36 Am. R. 325).

If the Constitution contained no provision upon the subject under discussion, other than those so far examined, I am satisfied that a claimant for the office of Governor or Lieutenant-Governor would have a right, under existing statutes, to go into the courts and contest the validity of the election of the person declared elected by the two Houses. And especially am I satisfied that the law-officers of the State, moving in behalf of the people, would have such a right. *McCrary Elections* (2d ed), section 264.

Each House is the judge, and the exclusive judge, of the election and qualifications of its members. That right they get partially from the Constitution, and partially from the usages and laws of parliamentary bodies. But the right thus acquired has no application to the Lieutenant-Governor, because he is not a member of either House.

The Constitution assigns to him certain duties, as President of the Senate, but that does not make him a Senator, or a member of that body, in such sense as that the Senate may pass upon his election and qualification as a member. See *Winter v. Thistlewood*, 101 Ill. 450.

There is, however, another provision of the Constitution, which, in my judgment, enlightened by much research, and

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the best thought I have been able to give to the subject, is controlling and conclusive against the right of the relator, Smith, to maintain this action.

The conclusion which I have been constrained to reach, I may say, is not in accord with my first impressions. The provision of the Constitution to which I refer is section 6, of article 5, R. S. 1881, section 132, and is as follows: "Contested elections for Governor or Lieutenant-Governor shall be determined by the General Assembly, in such manner as may be prescribed by law."

That section, without doubt in my mind, invests the General Assembly with judicial power to hear and determine contested elections for Governor and Lieutenant-Governor, and to the extent, and no further, that such powers are thereby granted, they diminish the general grant of judicial powers to the judicial department proper.

The clause, "in such *manner* as may be prescribed by law," had no reference to the grant of power. It neither enlarges nor lessens the grant. It has reference only to the manner or mode of executing the powers granted. The power thus granted to the General Assembly can not be augmented or abridged by legislation, nor by a failure of legislation. The statute provides, that the election of any person declared elected by popular vote to a State office, may be contested by any elector who was entitled to vote for such person.

It also provides, that such contest shall be tried before a committee of seven, chosen from each House of the General Assembly; that the committee shall report their judgment in the premises to both branches of the General Assembly; that it shall be entered on the journals of the respective Houses, and shall be conclusive. R. S. 1881, section 4746, *et seq.*

Section 4756, of the statutes, specifies certain causes as grounds of contest. That the election was without constitutional and statutory authority, is not specified as one of such causes. If, however, in the case before us, the election for Lieutenant-Governor in November last was without consti-

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tutional authority, the respondent, Robertson, has no right to the office.

The infirmity in his title to the office, in such case, would arise out of the invalidity of the election. And as such invalidity, if it exists, is to be determined by an examination of the Constitution and the statutes, I think it might be assigned as a cause of contest, although it is not specifically named in the above section of the statute as such cause. But as said by NIBLACK, J., to concede that the invalidity of the election is not specified in the statute as a cause of contest, and that to be made available it must be there specified, would not change the matter.

The Constitution creates the General Assembly the exclusive tribunal for the determination of contested elections for Governor and Lieutenant-Governor. It remains such exclusive tribunal, whatever be the character of the legislation as to causes and mode of procedure, or whether there is any legislation at all upon the subject. The jurisdiction of that tribunal, being established by the Constitution, can not, as I have said, be changed by legislative enactment.

The statute, as we have seen, establishes the General Assembly a tribunal for the trial and determination of contested elections for other State offices. The jurisdiction to try contested elections for such other offices, being conferred by statute, may be limited by the statutes which confer it, or by other statutes. As to such contests, the statutes may confer upon the courts concurrent jurisdiction in a like or different mode of procedure. That, as we shall see, has been done in this State.

It is argued by counsel, that the case before us, instituted by the relator, Smith, is not a case of contested election, nor in the nature of such a proceeding. Clearly, this is a contest over an office. The relator asserts his rights as President of the Senate, and seeks to have those rights settled in this contest with the respondent. He asserts that the respondent was elected Lieutenant-Governor at a general elec-

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tion in November, but is not Lieutenant-Governor, because that election was without authority. His success, upon his theory, depends upon the question as to whether or not that election was valid or invalid. The respondent, as stated in the complaint, claims that by virtue of that election, he is Lieutenant-Governor, and, as such, entitled to preside over the Senate. That claim the relator contests, or, to use the definition of the word "contest," that claim he "calls in question," "contends against," "controverts," "disputes," "opposes," "resists," and seeks to "litigate" in this proceeding. He is "calling in question," "contending against," "controverting," "disputing," "resisting," "contesting" the election of the respondent to the office of Lieutenant-Governor.

To say that the election through which the respondent claims was without authority, that for that reason there was no election, in the eye of the law, and that, therefore, the relator is not contesting, or seeking to contest an election, will not do. Whether or not there was a valid election, is the very question in contest. The relator's complaint shows that the respondent is claiming to have been elected Lieutenant-Governor at the last general State election; that that election was in all regards conducted according to the forms of law, and that the respondent received a majority of the votes cast for Lieutenant-Governor. His election to the office, however, is disputed, contested, on the ground that the election for Lieutenant-Governor was without authority—in violation of the Constitution.

An examination of the statutes under which this proceeding was instituted, will show that the proceeding is, and must be, a contest for an office, and, when an election is involved, a contest of that election. So far as material here, that statute is as follows:

Section 1131, R. S. 1881. "An information may be filed against any person * * in the following cases: *First.* When any person shall usurp, intrude into, or unlawfully hold or

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exercise any *public office* or any franchise within this State, or any office in any corporation created by the authority of this State."

Section 1132. "The information may be filed by the prosecuting attorney in the circuit court of the proper county, upon his own relation, whenever he shall deem it his duty to do so, or shall be directed by the court or other competent authority, or by any other person on his own relation, whenever he *claims an interest in the office, franchise, or corporation* which is the subject of the information."

Section 1134. "Whenever an information shall be filed against a person for usurping an office, by the prosecuting attorney, he shall also set forth therein the name of the person rightfully entitled to the office, with an averment of his right thereto; and when filed by *any other person*, he shall show *his interest* in the matter; and he may claim the damages he has sustained."

Section 1136. "In every case *contesting the right to an office*, judgment shall be rendered upon the *rights of the parties* and for damages the relator may show himself entitled to, if any," etc.

Section 1137. "If judgment be rendered in favor of the relator, *he shall proceed to exercise the functions of the office*, after he has been qualified as required by law; and the court shall order the defendant to deliver over all the books," etc.

Section 1141. "Whenever any person shall be found guilty of any usurpation of, or intrusion into, or unlawfully exercising any office * * within this State, * * * the court shall give judgment of ouster against the defendant, and exclude him from the office," etc.

Section 1144. "When an information is filed by the prosecuting attorney, he shall not be liable for costs; but when it is filed upon the relation of a private person, he shall be liable for costs, unless the same are adjudged against the defendant."

There are no italics in the above statutes, as printed; they

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are used here to direct attention to certain portions which I regard as important in this case.

Under that statute, when any person shall intrude, etc., into a public office, an information may be filed by the prosecuting attorney upon his own relation, or by any other person, "whenever he claims an interest in the office." He must show his interest in the office. "In every case contesting the right to an office," judgment shall be rendered "upon the rights of the parties." "If judgment be rendered in favor of the relator, he shall proceed to exercise the functions of the office."

Other statutes provide for contesting elections for county, township and city offices. In some instances, special tribunals are created. These statutes also prescribe a mode of procedure. R. S. 1881, section 4758, *et seq.*

The tribunals thus created, as well as the tribunal for the determination of contests in the case of State offices, other than Governor and Lieutenant-Governor, are statutory, and, as I have said, the authority which created them may give the courts concurrent jurisdiction.

It has often been contended in this State, that the special and statutory tribunals for the determination of contested elections have exclusive jurisdiction, and that such contests can not be determined in a proceeding by information. The contention has always been disregarded, and it has been held that the election of all officers (except for Governor and Lieutenant-Governor, as to which there has been no adjudication) may be contested and determined in a proceeding by information. Those holdings were rested upon the ground that the tribunals for the trial of such contests were statutory, and not constitutional, such as the tribunal established by the Constitution for the determination of contested elections for Governor and Lieutenant-Governor.

It has uniformly been held, too, that in order that a private person may prosecute a proceeding by information, he must show that he has an interest in the office. When he

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has shown this, he may, in that proceeding, contest the election of the adverse claimant, if he claims through an election. And when the claim of the adverse claimant is, that he is entitled to the office by virtue of an election, the contest waged by the relator, although in the form of a proceeding by information, is, in every practical sense of the term, a contest of an election. The election relied upon by the adversary in such case, is contested, and for all practical purposes, the proceeding is one of contested election. See *State, ex rel., v. Shay*, 101 Ind. 36, and cases there cited; *State, ex rel., v. Adams*, 65 Ind. 393.

In the case last above, it was said: "This court has frequently held that the right to an office may be contested by an information, during the time the statute for contesting elections was in force." See, also, *Reynolds v. State, ex rel.*, 61 Ind. 392; *State, ex rel., v. Gallagher*, 81 Ind. 558; *Ellam v. State, ex rel.*, 75 Ind. 518; *Gass v. State, ex rel.*, 34 Ind. 425.

It is not necessary to a contested election that both parties shall have been voted for at the election. Any citizen qualified to vote at the election may be a contestor. R. S. 1881, section 4743.

We must judge of the nature of the relator's case by the facts he states in his complaint. He does not claim to be Lieutenant-Governor, but he does claim that as President *pro tempore* of the Senate, he has the right to perform the duties which belong to the office of Lieutenant-Governor. To that extent, he claims to have an interest and right in the office of Lieutenant-Governor. That right he asserts against the respondent. And, as I have said, he shows in this complaint, that the respondent received the majority of the votes of the electors of the State, at the general election in November last, for the office of Lieutenant-Governor; that the election was in all things regular, and that the respondent claims to have been, and was, elected to that office, if the election was authorized by the Constitution. He contests

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the respondent's claim upon the ground that the election was invalid, being without constitutional sanction. He contests the election. The controversy is purely a private one, between the relator and the respondent.

The end sought is an adjudication that the respondent was not elected Lieutenant-Governor, and hence is not entitled to preside as President of the Senate, and that, therefore, the relator is entitled to preside as President of the Senate, having been duly elected to that position.

This is not a case where there has been no election at all. Whatever may be said as to the constitutionality of the election, the respondent comes into the contest through an election at which all the people voted.

Although not in name, in my judgment, this is a proceeding to contest the election of the respondent to the office of Lieutenant-Governor. The relator is thus waging a contest in the courts, which by the Constitution belongs exclusively to another forum. It must be waged and settled before the General Assembly. That tribunal alone has jurisdiction of the subject-matter.

It has exclusive jurisdiction, too, over everything that pertains to the controversy, both of law and fact. See *People, ex rel., v. Mahaney*, 13 Mich. 481.

There is no partition of the jurisdiction, giving to the General Assembly authority to determine the questions of fact, and to the courts authority to determine the law in the same case.

If the tribunal created to determine contested elections for Governor and Lieutenant-Governor were established by statute, and not by the Constitution, the relator might avail himself of the proceeding by information, as here attempted. The tribunal being established by the Constitution, he must seek his remedy in that tribunal.

This conclusion is fully sustained by the authorities cited by ELLIOTT, C. J., and which I need not cite here at length.

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State, ex rel., v. Baxter, 28 Ark. 129; *Baxter v. Brooks*, 29 Ark. 173.

It has been held in some of the States, that when special tribunals are established by statute for the determination of contested elections, their jurisdiction is exclusive, as against any proceeding by information in the courts, on the part of a claimant to the office. *Commonwealth, ex rel., v. Baxter*, 35 Pa. St. 263; *Commonwealth, ex rel., v. Leech*, 44 Pa. St. 332; *State, ex rel., v. Marlow*, 15 Ohio St. 114.

It does not result from the holding, that the courts have not jurisdiction of the subject-matter of this controversy, that the parties are without remedy. They have open to them the tribunal ordained by the Constitution of the State.

It ought to be presumed, that that tribunal is a capable and impartial one. The fathers had sufficient faith in it to establish it. We must respect their work, and trust it.

Possibly, it might have been better to have lodged in the judicial department of the government the jurisdiction to try contests involving the chief executive offices of the State.

However that may be, we must take the Constitution as we have received it, and yield obedience to its several provisions until they may be changed, if change is desirable.

What I have said in the foregoing, is with strict reference to the precise case before us.

Where there has, in fact, been an election, as in the case before us, and one of two persons claims an office through such an election, and another, disputing such an election, claims an interest in the same office, or its duties and emoluments, they must settle that contest in the tribunal established by the Constitution, and can not settle it in the court in a proceeding by information.

When we have determined that the court below was without jurisdiction, we have determined that its orders and judgments, whatever they were, must be reversed.

I do not say, that in no case can the courts, in a proceeding by information in the nature of *quo warranto*, upon the rela-

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tion of the proper law officer, oust from the office of Governor or Lieutenant-Governor, a wrongful intruder and usurper. That question is not before us. I may add, that there is a very marked difference between a proceeding by information, instituted by private persons, and a proceeding by information in the nature of *quo warranto*, upon the relation of a public prosecuting attorney. In the one case, the private person seeks to settle and protect private rights in a public office; in the other the officer moves in behalf of the sovereign people. See the following cases: *Reynolds v. State, ex rel.*, 61 Ind. 392 (403); *People v. Holden*, 28 Cal. 123; *Commonwealth v. Burrell*, 7 Pa. St. 34; *Hesing v. Attorney General*, 104 Ill. 292; *Vogel v. State, ex rel.*, 107 Ind. 374.

Filed Feb. 23, 1887.

ON PETITION FOR A REHEARING.

ELLIOTT, C. J.—It is not necessary to again discuss the questions considered in our former opinion, but there is one point made in the brief on the petition for a rehearing, which, perhaps, requires notice. It is said: "The injunction was granted by a judge in vacation whose jurisdiction depended not upon the summons in the case, but on the notice and service thereof, which notice and service thereof are not questioned." From this premise, counsel reach the conclusion that jurisdiction could not be challenged by a verified answer. This is a novel doctrine, for it impliedly assumes that the powers of a judge in vacation are greater than those of a court in term; whereas, as is well known, the powers of a court in term are very much greater than those of a judge in vacation. It surely needs no argument to prove that a judge in vacation can not have a greater jurisdiction than a court in term. The counsel's position is untenable for another reason, and that is this: It tacitly assumes that the plea did not fully challenge the jurisdiction of the court, when, in fact, the plea did deny the jurisdiction of the Ma-

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tion Circuit Court to proceed at all in the case. The injunction, as counsel asserted over and over again in argument, was a mere ancillary proceeding, and, certainly, where there is no jurisdiction of the person as to the principal cause of action, there can be none over a mere auxiliary proceeding wholly dependent upon the principal cause. There is yet even a stronger reason against the position of counsel, for, as all the members of the court agree, there was no jurisdiction of the subject-matter of the action so far as it sought an injunction, so that acts done in that branch of the case by the relator could not possibly confer jurisdiction of the person of the appellant.

The question of jurisdiction was the first question for decision, and of this question there were two branches: *First.* Whether the court had jurisdiction of the subject-matter. *Second.* Whether the court had jurisdiction of the person.

The formal grounds of the judgment of reversal were, that the action was not brought in the proper county, and that the circuit court had no jurisdiction to issue the injunction, and upon those points all of the judges agreed. Upon the other branch of the question of jurisdiction, that is, jurisdiction of the subject-matter, there was a diversity of opinion. The majority agreed in holding that in this case the court had no jurisdiction of the subject-matter; but, as to the line of reasoning by which that conclusion was reached, they did not in all things agree. All of the members of the court regarded the question of the jurisdiction of the subject-matter as before the court for decision, and, as two of the judges were of the opinion that the court had jurisdiction, while the other judges thought otherwise, it was deemed proper by the court that each of the judges should submit his individual views upon that branch of the question. Judges MITCHELL and HOWK expressed opinions upon the question as to the rights of the parties respecting the office in controversy, because they regarded a decision of that question as essential to a decision of the question of jurisdiction; but the

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majority declined to express any opinion upon that question, for, in their judgment, their power was exhausted and their duty done when they affirmed that there was no jurisdiction.

Petition overruled.

Filed March 11, 1887.

INDIVIDUAL OPINION.

NIBLACK, J.—As the petition for a rehearing brings this case again before us for such further consideration as we may feel it to be our duty to extend to it, I avail myself of the opportunity of adding something to the individual views I expressed at the former hearing. I am induced to adopt this course partly on account of the prominent relations which the cause has been made to sustain towards current public affairs in the State, and partly on account of the misapprehension which seemingly exists in the minds of many persons as to the reasons which restrained a majority of the members of this court from the expression of any opinion upon the actual merits of the controversy which caused the institution of this suit.

In the views which I formerly submitted I discussed and expressed an opinion upon some matters which were only incidental and collateral to the question of jurisdiction I was then considering. Such merely incidental and collateral matters were referred to and commented upon as illustrative of the peculiar nature of the contest then being waged between the appellant and the relator, Smith, and as, at least, indirectly sustaining my position that the courts of the State were utterly without jurisdiction over the subject-matter of that contest, and for no other purpose.

The main features of the contest which followed the Presidential election, held in the year 1876, have become a matter of history, and are, hence, within the reach, and in consequence presumably within the common knowledge, of all. The Electoral Commission created to assist in the settlement of that contest was not in any proper view a judicial tribu-

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nal. Its duties were kindred to those of a referee in a judicial proceeding. It was authorized to examine and to report to Congress upon certain questions referred to it, without trenching upon the right of the two Houses of Congress to ultimately decide who, if any one, had been elected either President or Vice-President of the United States. It was organized upon the accepted theory that the final decision as to who had been so elected rested ultimately with Congress, and could not, under the Constitution of the United States, be delegated to any other tribunal, and that, consequently, whatever such electoral commission might report, or recommend, would be in its nature advisory only.

Congress acted upon that theory when the commission reported, and the evidence of title which Mr. Hayes thereafter received was made to rest, and still rests, upon the subsequent action of Congress, which in its effect declared him to have been duly elected. During the continuance of the contest, some of the friends of Mr. Tilden, becoming discouraged with the prospect of obtaining a favorable decision otherwise in his behalf, inaugurated a movement to have Congress pass an act conferring jurisdiction over all the matters in dispute upon some court of the United States, and authorizing such court to determine all questions of title arising out of the conflicting claims of the contestants. But after considerable debate, and very general consultation, an informal, but none the less final and decisive conclusion was reached by those feeling themselves most interested, that the contest was, in all its essential features, a political contest, the decision of which the Constitution had devolved exclusively upon the two Houses of Congress, and that, consequently, Congress could not convert it into a judicial question, and confer upon a court the power to hear and to finally determine it.

The conclusion, thus informally reached, has since been generally accepted and acquiesced in by the country, as the more recent debates in Congress on the subject will fully

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establish. Moved and quickened by the events attending that remarkable contest, Congress has, within the past few months, enacted a law specifically providing for the manner in which all contests concerning the election of either President or Vice-President shall hereafter be settled by the two Houses of that body, and the exclusive power of Congress to determine all such contests will probably never again be considered an open question.

If any person will take the trouble to compare the several sections of our State Constitution having reference to the election and induction into office of Governor and Lieutenant-Governor, with the corresponding provisions of the Constitution of the United States concerning the election and induction into office of President and Vice-President, he will readily perceive that all matters in any manner affecting the election and title of Governor or Lieutenant-Governor, are more expressly conferred upon the General Assembly than are similar matters touching the election and title of President and Vice-President devolved upon Congress.

As to some features of the difference between a political and a judicial controversy, see the case of *Luther v. Borden*, 7 How. U. S. 1.

I have, therefore, believed from the first, and further investigation has ripened that belief into an imperative conviction, that the court below did not have, and that neither it nor any other court of the State could, under the Constitution, have conferred upon it, jurisdiction over the question as to whether any person has been lawfully elected Governor or Lieutenant-Governor. The consequent impropriety of any member of this court, who had reached the same or a similar conclusion, expressing an opinion as to whether the appellant holds a valid claim to the office of Lieutenant-Governor, and thus endeavoring to forestall and to control the action of the General Assembly, which alone, as we believe, has power to decide the question, appears to me to be too manifest to require extended comment. If this court, in com-

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mon with the other courts of the State, has no jurisdiction over the subject-matter of the appellant's claim to office, then any opinion we might give, however unanimously, on the subject-matter of that claim, could be at most only advisory. But this court is neither required nor authorized to give merely advisory opinions. The Attorney General is the law officer of the State provided for that purpose. He is charged with the duty of giving advisory opinions at the request of the Governor, or any other State officer, or of either House of the General Assembly. R. S. 1881, section 5667.

The late Attorney General, several months before the last general election, gave an advisory opinion that there was then a vacancy in the office of Lieutenant-Governor, and that the vacancy was one which could be filled at that election.

The State Senate, acting upon its own judgment, as it had the power to do, and in accordance with the independent views of a majority of its members, came to a conclusion entirely adverse to that reached by the Attorney General, and proceeded with the business of the session accordingly. If this court, whether acting unanimously or through a majority of its members only, had, at the former hearing, assumed to decide, notwithstanding our announced want of jurisdiction over the question, in accordance with the opinion given by the Attorney General, our decision would have afforded the Senate no authoritative reason for changing the line of policy which it had adopted, and we have no assurance that, under the circumstances, any such a change of policy would have resulted. On the contrary, if, acting as above, we had assumed to decide that the alleged election of the appellant was invalid, our decision would not have bound the House of Representatives, which from the first recognized the appellant as the lawfully elected Lieutenant-Governor. Such a decision would doubtless have been treated by that body as an intrusion upon its exclusive authority as a co-ordinate branch of the General Assembly. Thus, whatever opinion

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we, of the majority, might have announced, would, in the very nature of the controversy, have become a new cause of exasperation between the two Houses, and would have tended to crystallize more firmly the disorganization which already existed between them.

It was, as it seems to me, unreasonable to expect that, in a most exciting political crisis like that through which the General Assembly has just passed, and in relation to a most important and momentarily overshadowing question, the opinion of an Attorney General, or the voluntary, extra-judicial and merely individual views of any judge, or set of judges, would have been accepted as a finality by those representing adverse interests, or holding radically different views.

Then, too, the promulgation of any majority opinion upon the merits would have needlessly connected this court with an exciting and bitter political controversy, which it had no power to control, or even to mitigate in the smallest degree. Those of us who think we have no power to pass upon the appellant's title, ought certainly not to have been expected to go out of our way to give it moral support on the one side, or to merely besmirch it on the other.

As to those of our number who believe the courts of the State have jurisdiction over the subject-matter of this proceeding, there was an evident propriety in their expressing their views on the merits of the contest for the information of those most interested, as well as for that of the inferior courts; but for those of us who maintain an entire want of jurisdiction, common consistency enjoined a discreet and respectful silence upon the merits. It would certainly not be consistent for this court to first hold that jurisdiction of a cause, inadvertently before it, belonged exclusively to the Supreme Court of the United States, and then, notwithstanding, to proceed to decide it upon its merits. Such a decision would settle nothing, and could, hence, do no practical good, and might mislead and do positive harm. When, therefore, to speak may mislead, silence ought to be carefully observed.

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In my view, there is nothing we can proclaim either as to the official or non-official *status* of the appellant which the General Assembly may not, at any time, when in session, overrule, and when we should be so overruled it would be our duty to acquiesce, however damaging it might be to our consistency or to our authority as a court.

If an act of the present General Assembly, whether passed at the regular or some special session, shall come before us, signed by the appellant on behalf of the Senate, and otherwise duly certified and approved, it will be our duty to assume that the appellant was, at the time he affixed his signature, the acting and qualified Lieutenant-Governor of the State, and that he had been so recognized by the two Houses of the General Assembly. On the other hand, when an act of the current General Assembly shall come before us, signed by the relator, Smith, or some other person, as President *pro tempore* of the Senate, we will be required to assume that the person so signing was elected to preside over the Senate at a time, and under circumstances, which authorized his election. So that the Senate settles for us, and not we for it, who, for any occasion, is its proper presiding officer.

The Constitution plainly contemplates a concurrence of action between the two Houses in all matters which pertain to the organization of each, as well as in those things which require the joint action of both, but when the two bodies fail to concur, each must necessarily determine for itself everything that relates to its own organization. No means are provided by our scheme of State government by which unity of action between the two Houses can be constrained, or either House coerced, to act against its will. There is no appeal from what either House may do, except to the people through the medium of the ballot-box.

- The executive department may aid in preserving the public peace, but nothing more.

It is due to frankness to state that, believing as I have from the first that the courts of the State have positively

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nothing to do with the validity or invalidity of the appellant's title, I have never examined the questions made concerning it with that care which would enable me to promulgate an opinion on the subject worthy of the occasion, or by which I might hereafter be willing to be bound in the light of future events. I have so far refrained, and I expect to continue to refrain, from the formal expression of any opinion in that respect, which might be urged against, or brought into conflict with, any action which the General Assembly may have taken, or may hereafter take, in regard to the appellant's claim to official recognition. As a citizen and a member of a co-ordinate branch of the State government, I stand ready to acquiesce in whatever action, if any, that body shall at any time take on the subject.

If the disorganization which has so far existed shall continue to the end, I can then only regret what I, in common with others similarly situated, have no power to relieve.

Filed March 11, 1887.

No. 11,057.

MILLET ET AL. v. FORD.

WILL.—*Life-Estate with Remainder to "Heirs."*—*Intention of Testator.*—*Rule in Shelley's Case.*—A will provided as follows: "I give and bequeath unto my son, James R. Rachels, during his lifetime, the following real estate," describing it; "to have the use of the above described land during said James' lifetime, and, after his death, to the heirs of his body bequeath [begotten] in lawful wedlock, and none others. I also give and bequeath to John C. Rachels, my son," certain described real estate, "said John to have the use of the same during his life, and, after his death, to his children bequeath [begotten] in lawful wedlock."

Held, that James R. Rachels took only a life-estate in the land devised to him, the fee going to his children.

Held, also, that the intention of the testator being plain, the rule in Shelley's case will not be allowed to defeat it.

From the Posey Circuit Court.

109	159
124	373
109	159
131	385
109	159
136	385
109	159
147	100

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A. P. Hovey and G. V. Menzies, for appellants.

A. Iglehart, J. E. Iglehart, E. Taylor and E. D. Owen, for appellee.

Howk, C. J.—In this case the appellee sued the appellants to recover the possession of certain real estate in Posey county, and to quiet his title thereto. The cause was put at issue and tried by the court, and a finding was made for the appellee; and over the appellants' motion for a new trial, the court rendered judgment accordingly.

The only error complained of here by the appellants is the overruling of their motion for a new trial.

With his complaint herein, appellee filed an abstract of his title to the lands in controversy. By this abstract, to which, of course, his evidence was confined, his chain of title to such lands was substantially as follows:

1. John B. Rachels became possessed of such lands about the year 1825 or before, of which lands he and his assigns held adverse, peaceable possession until his death, which occurred in the latter part of 1858, or early in 1859.

2. John B. Rachels, on the 25th day of July, 1857, or thereabouts, executed his last will and testament, which was duly admitted to probate in Posey county, whereby he devised such lands to James R. Rachels, who was a son of such testator, in fee simple.

3. James R. Rachels went into the possession of said lands under said will. He and his wife afterwards executed to Richard Ford a mortgage, with the usual covenants of warranty; and Richard Ford became the purchaser of the lands at the sale upon the foreclosure of such mortgage. At the expiration of the year allowed by law for the redemption of such lands, Richard Ford went into possession thereof by James R. Rachels, as his tenant, and afterwards assigned his sheriff's certificate of such purchase to William M. Ford, the plaintiff herein; whereupon the sheriff of Posey county executed to the plaintiff his deed therefor, according to law.

4. The defendants herein were the grandchildren of John B. Rachels, and the children of James R. Rachels, and had been in the possession of the lands in controversy since the death of James R. Rachels.

It will be observed that the devise of an estate in fee simple to James R. Rachels, in the lands in controversy, by the last will of John B. Rachels, is an indispensable link in appellee's chain of title. If, as appellants claim, James R. Rachels took no higher or greater estate in such lands than a life-estate for his own life, under the last will of John B. Rachels, and if, as they claim, the lands were devised to them in fee simple, in and by such last will, subject only to the life-estate therein of James R. Rachels for his own life, then it is clear that the appellee had no valid or subsisting title to the lands, and the finding of the trial court in his favor, as against the appellants, was not sustained by sufficient evidence and was contrary to law. This brings us to the consideration of what we regard as the controlling question in this cause, namely: What is the proper and legal construction and interpretation of the last will of John B. Rachels, and, especially, of the devise therein to James R. Rachels?

We set out, in this connection, all the provisions of such last will that can have any possible bearing on the subject of such question, as follows:

"*First.* I give and bequeath unto my son, James R. Rachels, during his lifetime, the following real estate in Posey county, Indiana, to wit" (we omit the description), "making in all one hundred and thirty acres, to have the use of the above described land during said James' lifetime, and, after his death, to the heirs of his body *bequeath* (sic) in lawful wedlock, and none others. I also give and bequeath to John C. Rachels, my son, the balance of my real estate during his lifetime, it being the forty-acres' tract in Gibson county; said John to have the use of the same during his life, and, after his death, to his children *bequeath* (sic) in lawful wedlock."

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The foregoing are the only devises of real property, in the last will of John B. Rachels. In each of these devises, it was the manifest intention of the testator to give his son named therein a life-estate only, for his own life, in the lands devised to him, and, after his death, to give to his children, as the heirs of his body begotten in lawful wedlock, the fee simple estate in such lands. This is clearly so, as it seems to us, beyond any room even for a shadow of doubt. The accepted rule in the courts of this State, for testamentary construction and interpretation, is that the intention of the testator, in making the devise or bequest under consideration, must be ascertained and carried into effect, if possible; but this intention must, generally speaking at least, be gathered from the language of the will itself. *Tyner v. Reese*, 70 Ind. 432; *Lofton v. Moore*, 83 Ind. 112; *Hinds v. Hinds*, 85 Ind. 312; *Downie v. Buennagel*, 94 Ind. 228; *Pugh v. Pugh*, 105 Ind. 552.

It is claimed, however, by appellee's learned counsel, that "the rule in Shelley's case" is applicable to the foregoing devise to James R. Rachels, and that, under this rule, James R. Rachels took an estate in fee simple, under the testator's will, in the lands devised to him. It is difficult to reconcile "the rule in Shelley's case" with the accepted rule, sometimes called "the cardinal rule," heretofore stated, for testamentary construction and interpretation. But this court has held that, as the common law has been adopted by statute in this State, the rule in Shelley's case is binding upon the courts as a law of real property, and has applied such rule in the construction of devises. *Siccloff v. Redman*, 26 Ind. 251; *McCray v. Lipp*, 35 Ind. 116; *Gonzales v. Barton*, 45 Ind. 295. While we might not agree to the application of the rule in Shelley's case to testamentary construction, if the question could be regarded as an open one, yet we would feel constrained, in a proper case, to adhere to our previous decisions.

In the well-considered case of *McMahan v. Newcomer*, 82

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Ind. 565, in speaking of the application of the rule in Shelley's case to the construction of a devise of real property, the court says: "A fee will pass if, taking all the provisions of the will together, it is clear that the testator intended to vest such an estate in the devisee. 4 Kent Com. 535; *Smith v. Meiser*, 51 Ind. 419. It is settled law that the rule in Shelley's case will not be allowed to defeat the plain intention of a testator. *Doe v. Jackman*, 5 Ind. 283; *Siceloff v. Redman*, 26 Ind. 251; *Helm v. Frisbie*, 59 Ind. 526; section 2567, R. S. 1881."

Applying the doctrine of the case last cited to the case under consideration, and taking together all the provisions of the last will of John B. Rachels, we are clearly of the opinion that the testator did not intend to vest the fee simple estate in the lands devised in either of his two sons, James R. or John C. Rachels; that he did intend to vest in each of his sons precisely the same estate, to wit, a life-estate only, for his own life, in the lands devised to the son; and that he further intended that, at the death of each son, James R. as well as John C. Rachels, the fee simple estate in the lands devised to him for his life only should vest absolutely in the children of such son, as the heirs of his body begotten in lawful wedlock. The language used by the testator, in each of the two devises, is almost identical even to the erroneous use of the word "bequeath," for the word "begotten," in each devise. Construing and interpreting the devise to James R. Rachels, with reference to all the provisions of the testator's will and in the light afforded by the context, we have no doubt that the testator intended to use, and did use, the words "heirs of his body, *bequeath* [begotten] in lawful wedlock," in such devise, in the sense of, and as synonymous with, the words "children *bequeath* [begotten] in lawful wedlock," as used by such testator in his devise to John C. Rachels. In other words, it is clear we think, from all the provisions of the will, that the children of each son were intended by the testator to be the ultimate objects of his

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bounty, in the lands devised to such son for his life only, and, after his death, to his children as the heirs of his body begotten in lawful wedlock. In *Doe v. Jackman*, *supra*, it was held that the rule in Shelley's case will not, in any case, be allowed to override the manifest intention of the testator, where such intention is neither unlawful nor inconsistent with established rules of law. Whenever, as in the case now before us, it is certain that the term *heirs* is used with the intention that they should take as children, or as purchasers, the will should be so construed. *Rapp v. Matthias*, 35 Ind. 332; *Brown v. Harmon*, 73 Ind. 412; *Clifford v. Farmer*, 79 Ind. 529; *Jones v. Miller*, 13 Ind. 337. See, also, *Hileman v. Bouslaugh*, 13 Pa. St. 344.

In the case in hand, we are of opinion that the rule in Shelley's case can not be allowed to override the manifest intention of the testator, in devising the lands in controversy; that, by such devise, James R. Rachels, through whom appellee derives his title, took only a life-estate, for his own life, in such lands; and that, under such devise, after the death of James R. Rachels, the appellants as his children and heirs of his body, begotten in lawful wedlock, became and were the owners in fee simple of such lands, and entitled to the possession thereof. The finding of the trial court, therefore, was not sustained by sufficient evidence, and was contrary to law; and for these causes appellants' motion for a new trial ought to have been sustained.

The judgment is reversed with costs, and the cause remanded for a new trial.

Filed Nov. 4, 1886; petition for a rehearing overruled Jan. 7, 1887.

Taylor v. Duesterberg, Administrator.

No. 13,252.

TAYLOR v. DUESTERBERG, ADMINISTRATOR.

FRAUDULENT CONVEYANCE.—Husband and Wife.—Trust.—Where, without his wife's consent, a husband takes the title to property purchased wholly with her money in his own name, a subsequent conveyance of it to her can not be set aside as fraudulent at the suit of a creditor of the husband. While the title is in the husband he holds it in trust for the wife, the equitable owner, and no act of his can enlarge his interest in the property.

SAME.—Exemption from Execution.—Judicial Sale.—Where property alleged to have been fraudulently conveyed by a husband is beyond the reach of his creditors by reason of the exemption law and the law vesting absolutely the wife's inchoate one-third in the event of a judicial sale, a deed made by the husband with the intention of vesting the title in his wife, even though it be voluntary and without consideration, is not fraudulent as against creditors.

SAME.—Witness.—Suit by Administrator.—In a suit by an administrator against a husband and wife to set aside an alleged fraudulent conveyance, the defendants are not excluded, by section 498, R. S. 1881, from testifying in their own behalf, that the property sought to be reached was purchased with the wife's money and the title taken in the name of the husband without her consent, and other matters relating to its purchase and improvement, although they occurred prior to the death of the decedent.

WITNESS.—Suit in which Administrator is Party.—Statute Construed.—The proper construction of section 498, R. S. 1881, seems to be, that when a party to a subject-matter or contract is dead, and his rights in the thing or contract have passed to another, who represents him in the action which involves such contract or subject-matter, the surviving party is not competent to testify to matters occurring during the lifetime of the decedent.

From the Knox Circuit Court.

H. S. Cauthorn and J. M. Boyle, for appellant.

W. A. Cullop, G. W. Shaw and C. B. Kessinger, for appellee.

MITCHELL, J.—This suit was commenced by Duesterberg, as administrator of the estate of Peter Burway, deceased, to set aside certain conveyances by which it is alleged Leroy S. Taylor made a fraudulent transfer of his real estate to his wife, Louisa Taylor.

109	165
129	128
109	165
131	228
133	500
109	165
141	404
109	165
147	119
109	165
148	438
148	439
149	213
152	188
152	262
109	165
167	647

Taylor v. Duesterberg, Administrator.

The complaint alleges that, at a date prior to the commencement of this action, Duesterberg, as such administrator, had recovered a judgment in favor of the Burway estate, against James Baker and Leroy S. Taylor, on a note executed by Baker and Taylor to Burway in his lifetime, and that for the purpose of hindering and delaying the collection of such judgment, the defendant, Leroy S. Taylor, had, before the rendition of such judgment, transferred all his property subject to execution, consisting of a certain lot in the city of Vincennes, to his wife, Louisa, without any consideration.

The prayer of the complaint is, that the conveyance may be set aside, and that the lot be subjected to the lien of the judgment, previously obtained.

Upon request, the court found the facts specially, and stated conclusions of law thereon favorable to the appellee, Duesterberg.

Mrs. Taylor brings the record here on appeal. It is contended, on her behalf, that the special finding of the court is not sustained by the evidence.

The plaintiff's case, as presented in his complaint, proceeds upon the theory, that in accepting the conveyance for the lot, which he was seeking to subject to the payment of the judgment, Mrs. Taylor was a mere volunteer. The complaint charges, moreover, that she had notice at the time the conveyance was accepted, that her husband's purpose in transferring the property was to hinder and delay his creditors.

Upon the evidence admitted, we are constrained to the conclusion that the finding of the court that Mrs. Taylor received the conveyance without any consideration, and that such conveyance was a fraud upon the creditors of her husband, is not sustained. That the title to the lot was originally taken in the husband's name, is not controverted, and that no consideration was paid by Mrs. Taylor for the conveyance at the time the title was transferred from her husband to her, is equally beyond dispute.

There was uncontradicted evidence, however, which es-

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tablished the following facts: The lot was purchased from Charles Graeter in July, 1881, for the consideration of one hundred dollars. The purchase-money was all paid out of money belonging to Mrs. Taylor and her children by a former marriage. The money was all derived from the sale of wheat which had been harvested from a small farm owned by Mrs. Taylor and her children, as tenants in common. Leroy S. Taylor did not pay one farthing of the original purchase-price. No one, so far as we can discover, claims that he did. At the time the lot was purchased it was unimproved. Subsequently, in September, 1881, a loan of three hundred dollars was made from Graeter. This was secured by the note of Leroy S. Taylor, and a mortgage on the lot in which Taylor and his wife joined. The money borrowed was all used in procuring materials and paying for labor employed in the erection of a house on the lot. This encumbrance has not been discharged. William Richardville, a son of Mrs. Taylor, paid for a part of the material used in the improvement of the lot. It does not appear from any evidence in the record that Leroy S. Taylor ever furnished any money to make improvements on the lot. The most that is claimed is that he contributed some of his own labor toward the improvement of the property. We have, however, been unable to find any evidence in the record which sustains even this claim.

The evidence shows, and the court found, that the lot and improvements were worth seven hundred and fifty dollars. The evidence in the record shows that all of Leroy S. Taylor's property, exclusive of that in controversy, was worth two hundred and ninety-six dollars.

Upon the facts disclosed it can not with propriety be said that the conveyance to Mrs. Taylor was without consideration, and therefore voluntary, nor was such conveyance a fraud upon the creditors of Leroy S. Taylor. He had no interest in the property except that he held the bare legal title; while the equity of his wife and her children, they having

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paid the entire purchase-price of the lot, was complete. Having taken the title in his own name without the consent of those who furnished the money, and paid the purchase-price, an enforceable trust resulted in their favor against Taylor. He held the title in trust for them from the beginning. The equitable owners were those whose money had been used in paying for the lot. This ownership is the subject of protection in a court of equity. *Heberd v. Wines*, 105 Ind. 237; *Mitchell v. Colglazier*, 106 Ind. 464, and cases cited; *Hileman v. Hileman*, 85 Ind. 1.

That Taylor subsequently borrowed money on the security of the trust property, with which to make improvements upon it, did not defeat or impair the rights of the equitable owners, as respects his general creditors. He paid no part of this encumbrance, so far as appears. That he signed the note for the money borrowed, and secured it by a mortgage on the lot, did not extend or enlarge his right to, or interest in, the property.

Mrs. Taylor's children may have had some cause to complain, because the conveyance was made to their mother alone, instead of to her and them jointly, their money having been used with that of their mother to pay for the lot, but this furnishes no ground upon which the creditors of Leroy S. Taylor can assail the transaction. Their right is to be confined to the actual interest which their debtor had in the property. Prior equitable interests could not be subjected to the claims of creditors. *Hays v. Reger*, 102 Ind. 524; *Wright v. Jones*, 105 Ind. 17; *Heberd v. Wines*, *supra*; *Foltz v. Wert*, 103 Ind. 404.

Creditors can not invoke the aid of the law, to prevent a husband from restoring to his wife and her children that which in equity and good conscience he has no right to withhold. *Proctor v. Cole*, 104 Ind. 373 (383); *Lord v. Bishop*, 101 Ind. 334.

A conveyance will not be set aside, nor the property subjected to the payment of the debts of a grantor who has

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transferred the title to one who has an equitable right thereto, where it appears that none of the money or property of such grantor has gone into the property so conveyed. *McLean v. Hess*, 106 Ind. 555.

Even if such grantor has some interest in the property, a conveyance by him to one having a prior equitable right can not be defeated without protecting the equity on account of which the conveyance was made. One who holds a legal title, which is supported by a prior subsisting equity, can not be postponed by, or put upon a level with, mere general creditors. Moreover, upon the facts as they appear, any judgment which could properly have been rendered would have been wholly fruitless of any ultimate benefit to the creditor. The property in dispute is worth \$750. It is encumbered by a mortgage of \$300. The debtor is and was at the time of the conveyance a resident householder of Knox county. The law secured to him an exemption of property of the value of \$600. The total value of his property other than that in dispute was \$296. He was, therefore, entitled to claim, in addition to his personal property, \$304 out of the real estate. Section 710, R. S. 1881.

Under the act of 1875, section 2508, R. S. 1881, a purchaser at an execution sale can acquire, as against the debtor's wife, only an undivided two-thirds interest in the land sold. It requires, therefore, only a moment's consideration to make it apparent, that without regard to the equitable right of Mrs. Taylor in the property, a judgment setting aside the conveyance would only result in harassing the debtor, without any corresponding benefit to the creditor. Even if Leroy S. Taylor had been the owner of the property in controversy, in his own right, since it appears that at the time the conveyance was made, his pecuniary condition, and the value of his property subject to execution, were such that his right of exemption protected the entire interest therein from sale, the deed should not have been declared fraudulent and set aside.

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Where property, alleged to have been fraudulently conveyed, is, by force of the law, as effectually beyond the reach of creditors before as it is after such conveyance, a deed made with the intention of vesting the title irreclaimably in another, even though it be voluntary, is not fraudulent as to creditors.

What a debtor does with his property which is by law exempt from execution, is a matter in which his creditors have no concern. Fraud can not be predicated upon the alienation of such property. *Burdge v. Bolin*, 106 Ind. 175 (55 Am. R. 724); *Fauvrot v. Carr*, 108 Ind. 123.

At the trial Mrs. Taylor and her husband were called as witnesses in their own behalf respectively. It was proposed to prove by them severally, in substance, that the property in dispute had been purchased and paid for with the money of Mrs. Taylor, and that the title had been taken in the name of her husband without her knowledge.

Without setting out at length the testimony proposed to be given in that connection, it is sufficient to say, the evidence offered related exclusively to business transactions between Mrs. Taylor and her husband, concerning the purchase and improvement of the lot in question. The evidence was excluded by the court, on the ground that the witnesses were incompetent to testify in respect to matters which occurred during the lifetime of the deceased. This ruling was based upon the court's construction of section 498, R. S. 1881.

This section provides, that, "In suits or proceedings in which an executor or administrator is a party, involving matters which occurred during the lifetime of the decedent, where a judgment or allowance may be made or rendered for or against the estate, * * any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a competent witness as to such matters against such estate."

Under that section the test of competency depends, not so

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much upon the fact to which the adverse party is called upon to testify, as upon the contract or matter involved in the issue in the case. Where the contract or matter involved in the suit or proceeding is such that one of the parties to the contract or transaction is, by death, denied the privilege of testifying in relation to such matter, the policy of the statute is to close the lips of the other also in respect to such matter. Where, however, an administrator assails the title of another, such title having been acquired through a third party, in a transaction to which the decedent was a stranger, the parties to the transaction can not be prevented from speaking in reference to such matters, even though they occurred during the lifetime of the decedent. A contract or matter in which the decedent in his lifetime never had any concern or interest, can not be so involved in a suit by his personal representative as to preclude the parties interested in the transaction, although it may come collaterally in question, from upholding it by their own testimony. If it were otherwise, the death of a stranger, who presumably could not have testified concerning the matter if living, would close the mouths of the only persons interested in the contract when it was made.

The true spirit of the statute seems to be, that when a party to a subject-matter or contract, in action, is dead, and his rights in the thing or contract have passed to another who represents him in the action or proceeding which involves such contract or subject-matter, to which the deceased was a party, the surviving party to that subject shall not testify to matters occurring during the lifetime of the decedent. *Warren v. Steer*, 112 Pa. St. 634; *Granger v. Bassett*, 98 Mass. 462; *Downs v. Belden*, 46 Vt. 674; *Sanborn v. Lang*, 41 Md. 107; *Amonett v. Montague*, 63 Mo. 201; *Pattison v. Armstrong*, 74 Pa. St. 476; 1 Whart. Ev., sections 468, 469, 470.

The contract or transaction between Mrs. Taylor and her

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husband was not the subject-matter of the action. It arose on the evidence merely, and was, and could have been, only brought collaterally in question. It was, therefore, error to exclude their testimony.

It was error to overrule the appellant's motion for a new trial.

Judgment reversed, with costs, and new trial ordered.

Filed Jan. 11, 1887.

No. 12,496.

THE ST. JOSEPH HYDRAULIC COMPANY v. THE CINCINNATI, WABASH AND MICHIGAN RAILWAY COMPANY.

RAILROAD.—*Appropriation Proceedings.—Description.—Action to Recover.—*

Where, in a proceeding by a railroad company to appropriate land, the description in the instrument of appropriation is sufficient to indicate to the owner the land wanted, the latter can not, after having appeared in the condemnation proceedings without making any objection to the description, maintain an action to recover the land.

From the Elkhart Circuit Court.

J. M. Vanfleet, for appellant.

C. E. Cowgill, for appellee.

ELLIOTT, C. J.—The appellant seeks by its complaint to recover real estate alleged to be in the possession of the appellee. Issues were joined and a trial had, resulting in a judgment against the appellant. The question comes to us on the ruling denying a new trial.

The appellee instituted proceedings to condemn the land in controversy, and in the instrument of appropriation, thus described the property:

“A strip or parcel of land in the county of Elkhart, and State of Indiana, described as follows, to wit: A strip or

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parcel of land in the northeast quarter of section five (5), township thirty-seven (37) north, of range five (5) east, commencing at the thread of the stream of the St. Joseph river dividing the land herein described from the land on the south belonging to the Elkhart Hydraulic Company (or to the United States), extending thence in a northwesterly direction along the line of the road, as now located, of the railway company, to where the said company's proposed road, as located, intersects the highway known as the Cassopolis highway, for a distance of fifteen hundred and fifty (1550) feet, and said strip being four (4) rods wide, that is, two (2) rods in width on each side of the middle line, as now located, of said proposed railroad, for the full length of said strip, except that for the distance of three hundred and twenty-five (325) feet from the south end thereof, so much of said strip of land as lies on the west side of the middle line of the company's road to be only twenty feet in width."

Notice was given, and at the proper time the appellant appeared and objected to the proceeding, but on what grounds, or to what part of the proceedings, the evidence does not disclose. The court overruled the objections and appointed commissioners to appraise the land sought to be appropriated. They reported to the court, and in their report described the land substantially as it is described in the instrument of appropriation. The line of the railroad was fixed by a survey and a profile correctly showing the line, and they were on file at the time the instrument of appropriation was filed in the clerk's office.

While the commissioners were examining the land sought to be appropriated, the appellant was present by its officers and pointed out to the commissioners to what extent the seizure and use of the land would injure the appellant.

On the 20th day of October, 1881, the commissioners properly filed their report assessing the damages of the appellant at \$350. This sum was paid to the clerk on the day the report was filed, for the use and benefit of the appellant.

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The contention of the appellant's counsel is that the appellee acquired no title to the land in dispute, for the reason that the description in the instrument of appropriation is insufficient. It is not necessary for us to decide whether the description would have been sufficient under the provision of the statute requiring "a precise description of the land desired to be taken," if the objection had been made in the condemnation proceedings, for here the question was not presented in the condemnation proceedings, but in a purely collateral manner. The rule as to the description is very strict where the question is made in the condemnation proceedings. *Indianapolis, etc., R. R. Co. v. Newsom*, 54 Ind. 121; *Midland R. W. Co. v. Smith*, *post*, p. 488.

There are, however, obvious reasons why the rule declared in these cases should not apply where the objection is not made until after the judgment in the condemnation proceedings has been entered and the assessment paid into court. It is a principle running through many cases, and enforced in many forms, that an objection made seasonably and in the original proceeding will be given force, which would be utterly unavailing in a mere collateral attack. We can perceive no reason why the general principle should not apply here, for the judgment of the court in the condemnation proceedings must settle all questions as to the sufficiency of the instrument of appropriation, or else it settles none. The general doctrine which must rule this case was asserted in *Indiana, etc., Co. v. Louisville, etc., R. W. Co.*, 107 Ind. 301, and is decisive of the controversy.

The case now in hearing is much stronger than the case referred to, for here the land-owners took part in the examination made by the commissioners after having appeared and objected to the proceedings. If the description was deemed insufficient, it ought to have been objected to at the proper time, and it is now too late to raise that question.

We do not decide, or mean to decide, that the description is insufficient in any material respect; on the contrary, we in-

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cline to the opinion that it should be held sufficient, no matter what the form of the attack.

The familiar principle, so often applied in determining the sufficiency of descriptions, properly applies here, for this description can be made certain, and that which can be made certain is so in law. The map or profile required by the statute, together with the monuments referred to in the description, it seems to us, supplies means for fully and accurately identifying the land. But we need go no further in this case than to decide that there is some description of the land, and that as it was sufficient to indicate to the owner what the railroad company desired to appropriate, the owner can not, after having appeared in the condemnation proceedings, and made no objections to the description, maintain an action to recover the land.

Judgment affirmed.

Filed Jan. 8, 1887.

No. 12,991.

GREEN v. THE STATE.

CRIMINAL LAW.—*Frequenting Gambling House.*—*Evidence.*—Where a person is indicted for frequenting a place where gambling is permitted, evidence that the defendant was in such place on one occasion is not sufficient to sustain a conviction.

From the Jay Circuit Court.

C. Corwin and *J. M. Smith*, for appellant.

L. T. Michener, Attorney General, and *W. B. Hord*, for the State.

NIBLACK, J.—Section 2085, R. S. 1881, enacts that “Whoever, for the purpose of gaming with cards or otherwise, travels about from place to place, or frequents any place where

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gambling is permitted, or engages in gambling for a livelihood, is a common gambler, and, upon conviction thereof, shall be fined not more than one hundred dollars nor less than five dollars, to which may be added imprisonment in the county jail not more than three months nor less than ten days."

On the 30th day of December, 1885, an indictment was returned in the court below against the appellant, Edward O. Green, for frequenting a certain described house in which gambling was permitted, on divers days and times between the 1st day of August, 1885, and the time of returning the indictment.

The circuit court, trying the cause without a jury, found the appellant guilty as charged, assessing a fine only against him, and rendered judgment accordingly.

Several witnesses testified to having seen the appellant on the night of the 17th day of October, 1885, in a room of the building, described in the indictment, engaged in a game on which money was wagered, but there was no evidence either showing or tending to show that he had ever visited the house, or been present at any game played in it, at any other time.

This evidence was clearly insufficient to sustain the finding of the circuit court.

Webster, in his dictionary, states the meaning of the verb "to frequent" to be "to visit often," "to resort to often or habitually."

Proof of an occasional visit to a house in which gambling is permitted, is not sufficient to sustain a conviction in a case like the one before us. To make the *frequenting* of such a house a misdemeanor, it must be something akin to, or in the nature of, a habit. When a person engages in a game for a wager, whether in a gambling house or elsewhere, he commits a criminal offence, but the offence which he thus commits is an essentially different one from that charged in this case.

A person may be guilty of *frequenting* a gambling house

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for the purpose of gaming without actually engaging in any game. *Howard v. State*, 64 Ind. 516.

It is a dissolute and demoralizing course of life against which the law declares in the second division of the statute herein above set out.

Reference is also made to the following authorities: *State v. Miller*, 5 Blackf. 502; *State v. Allen*, 69 Ind. 124; Bishop Stat. Crimes, section 1018; 1 Bishop Crim. Law, section 1102, vol. 2, section 651; *State v. Markham*, 15 La. An. 498; *Antle v. State*, 6 Texas App. 202.

The judgment is reversed, and the cause remanded for a new trial.

Filed Jan. 12, 1887.

100	177
124	447
126	449
100	177
147	9
147	130

 No. 12,337.

BEITMAN v. HOPKINS ET UX.

EVIDENCE.—*Communications Between Husband and Wife.*—*Fraudulent Conveyance.*—*Consideration.*—*Statute Construed.*—In a suit against a husband and wife to set aside an alleged fraudulent conveyance from the former to the latter, the negotiations between them prior to the conveyance, relative to the consideration, are not incompetent under section 497, R. S. 1881, and are admissible in evidence.

TRIAL.—*Special Judge.*—*Failure to Sign Judgment.*—*Right to Sign at Subsequent Term.*—*Re-Trial.*—Where a cause is tried by a special judge, who neglects to sign the record of the final judgment, at the term at which it is rendered, he may sign it at a subsequent term. Such failure is at most a mere irregularity, and does not entitle the judgment defendant to a re-trial.

From the Daviess Circuit Court.

F. M. Haynes, *A. J. Padgett* and *J. Downey*, for appellant.
J. W. Burton, for appellees.

ZOLLARS, J.—Appellant, having a judgment against Ezekiel Hopkins, brought this action against him and his wife,
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Martha, to set aside a conveyance of real estate from him to her, upon the ground that it was fraudulent and void as against creditors, and especially as to appellant.

The consideration expressed in the deed is one dollar, and the repayment of money which, prior to the conveyance, the husband, Ezekiel, had received from the wife, Martha. Upon the trial, the wife was allowed to state that at the time the deed was executed, it was agreed between her and her husband, that the land should be conveyed to her in payment of the husband's indebtedness to her, and that as a further consideration she agreed to assume and pay a mortgage upon the land executed by the husband, and in the execution of which she had not joined.

Appellant objected and still objects to the evidence, upon the ground that it was the detailing of communications between the husband and wife, and hence incompetent under section 497 of the code. The evidence was a statement of the negotiations between the husband and wife prior to, and which resulted in, the conveyance of the land. In our judgment, those negotiations were in no sense such communications between husband and wife as are rendered incompetent under the above section of the statute. Such, clearly, is the result of the holding in the case of *Schmied v. Frank*, 86 Ind. 250. The holding in that case, upon the point involved here, is applicable, and authority, in the construction of our present statute. See, also, as bearing upon the question, *Mitchell v. Colglazier*, 106 Ind. 464; *Sedgwick v. Tucker*, 90 Ind. 271.

The cause was tried, and judgment rendered, by a special judge. He neglected to sign the record of the final judgment. At a subsequent term of the court, appellant made a motion to have the cause redocketed for another trial, because of such failure of the special judge to sign the record at the term at which the judgment was rendered. Over appellant's objection and exception, the special judge overruled that motion, and signed the record.

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The failure of the special judge to sign the record of the final judgment at the term at which the judgment was rendered, did not render the judgment void. It was at most but an irregularity, and could in no event entitle appellant to a re-trial. And if it should be conceded that the special judge had no authority to sign the judgment at the time he did, it would not follow at all, that the judgment was void.

We think, however, that under section 415, R. S. 1881, the special judge had authority to pass upon appellant's motion, and to sign the record at the time he did. The statute, it will be observed, is an enlargement upon prior statutes, and was intended to clothe special judges with authority to act in cases in which they are called to preside, until the final judgment is rendered, entered up, and signed.

Some question is made as to the sufficiency of the evidence to sustain the verdict in favor of appellee Martha Hopkins. We can not reverse the judgment upon the weight of the evidence. It may be observed in passing, that three juries, in the separate trials, decided the questions of fact in her favor. We find no error for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed Jan. 8, 1887.

No. 12,064.

THE INDIANAPOLIS, PERU AND CHICAGO RAILWAY COMPANY v. PITZER.

RAILROAD.—*Negligence.—Permitting Child to Enter Train.*—The mere fact that a child of tender years is permitted by the persons in charge of a passenger train to enter it at a regular station, is not in itself sufficient to charge the railroad company with negligence.

SAME.—*Intruder.—Care Required Respecting Child.*—The conductor of a train, upon which a child seven years old has become an intruder, is

100	179
125	188
126	220
127	553
100	179
134	560
109	179
141	565
143	465
109	179
144	401
109	179
151	44
151	617
151	623
100	179
154	432
100	179
162	469
109	179
164	117

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bound to use greater care in dealing with such child than is required respecting older persons.

SAME.—*Trespassing Child.—Duty of Trainmen.*—Where a young child is seen upon the track by the persons in charge of a train, more care is required than in the case of one who has reached the age of discretion. There is no presumption that it will heed signals of danger, and the engineer is bound to stop the train, if he sees that the child makes no attempt to leave the track.

SAME.—*Liability of Company.*—A boy seven years old, without the fault of his parents, wandered to a railroad station, entered a passenger train and was carried to a distant station, where the conductor put him off, leaving him in charge of no one, and giving no instructions concerning him. The child, left to himself, went upon the track, at a place near a highway crossing, where he could be seen for three-fourths of a mile by persons in charge of a train coming from the south. A freight train moving northward, in the daytime, on an ascending grade, where it could easily have been stopped had an effort been made to do so, ran upon and killed the child.

Held, that the railroad company is liable.

SAME.—*Damages.*—The responsibility of a wrong-doer for consequential damages resulting from his act, is the same in cases of actionable negligence as in cases of wilful or malicious torts.

SAME.—*Pecuniary Condition of Parent.—Attendants for Children.*—The pecuniary condition of the parent, and his inability to employ servants to take care of his children, are not proper subjects for consideration by the jury in an action by him for negligently causing the death of a child.

JUROR.—*Examination.—Supreme Court.—Practice.*—The Supreme Court will not pass upon a rejected question, propounded to a person called as a juror, touching his competency, unless the entire examination of such juror is set out in the record, in order that it may be shown whether any injury was done.

From the Howard Circuit Court.

C. B. Stuart and W. V. Stuart, for appellant.

J. W. Kern, J. C. Blackledge, W. E. Blackledge and B. C. H. Moon, for appellee.

ELLIOTT, C. J.—The material allegations of the appellee's complaint are these: That the son of the appellee, aged seven years and two months, without the fault or negligence of his parents, wandered to the depot of the appellant, in the city of Kokomo, and was carelessly and negligently permitted to

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get on one of its passenger trains which stopped for five minutes at that depot; that the child was carried to Jackson station; that the conductor of the appellant's train "wrongfully, carelessly and negligently put the child, Arthur Pitzer, off at that station, without leaving him in charge of any person, or giving any one instructions concerning him;" that the conductor well knew that Arthur Pitzer had been carried to that point through the carelessness and negligence of the agents and employees of the defendant; that the child, having been thus wrongfully put off the train at Jackson station, without being placed under the control or in the charge of any person, and without the fault or neglect of his parents, was casually upon the track of the defendant at a point on the line thereof, at or near where a highway crossed it, about one and one-fourth miles north of Jackson station; that, at that point, between the hours of four and five o'clock P. M., he was run over and killed by a freight train of the appellant; that although he was on the track at a place where he could be seen, and was seen, by the trainmen for a distance of three-fourths of a mile, no signals of warning were given, but without such signals, and without any effort to stop the train, the employees of the defendant ran the train upon him, although there was an ascending grade, and the train could easily have been stopped.

We regard it as quite clear that the appellant was not in fault for allowing the child to get upon the train. If in any event a railroad company could be made liable for carelessly permitting a person, young or old, to get upon one of its passenger trains, it can not be made liable in such a case as that stated by the complaint. It does not appear that the child was not, so far, at least, as the servants of the appellant could observe, in company with adult persons who entered the train at the city of Kokomo, nor does it appear that the appellant's employees knew, or could have known, that he had no right to take passage. We suppose it to be perfectly clear that a child of tender years may enter a railroad train with-

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out subjecting the company to the charge of negligence, and that the mere failure to keep a child off the train will not supply a foundation for an action. We know of no principle that requires railroad companies to keep watch to prevent persons, young or old, from entering their passenger trains at a regular station. If in any case of this character a railroad company can be made liable for allowing a child to enter one of its passenger trains, it can only be a case where facts are stated showing that it was wrong to permit the child to get upon the train, and here there are no such facts pleaded. We conclude, therefore, that the mere fact that the child was permitted to enter the passenger train creates no cause of action against the appellant, for he entered the train as an intruder. Intruders, infants or adults, can not, as a general rule, impose any duties upon the person on whose property they intrude. *Lary v. Cleveland, etc., R. R. Co.*, 78 Ind. 323 (41 Am. R. 572); *Everhart v. Terre Haute, etc., R. R. Co.*, 78 Ind. 292 (41 Am. R. 567); *State, ex rel., v. Harris*, 89 Ind. 363 (46 Am. R. 169), see p. 366; *Nave v. Flack*, 90 Ind. 205 (46 Am. R. 205), see p. 206; *Evansville, etc., R. R. Co. v. Griffin*, 100 Ind. 221 (50 Am. R. 783); *Hestonville, etc., R. W. Co. v. Connell*, 88 Pa. St. 520 (32 Am. R. 472); *Morrissey v. Eastern R. R. Co.*, 126 Mass. 377 (30 Am. R. 686); *Gavin v. City of Chicago*, 97 Ill. 66 (37 Am. R. 99); *McAlpin v. Powell*, 70 N. Y. 126 (26 Am. R. 555); *Snyder v. Hannibal, etc., R. R. Co.*, 60 Mo. 413; *Zoebisich v. Tarbell*, 10 Allen, 385; *Brown v. European, etc., R. W. Co.*, 58 Maine, 384; *Baltimore, etc., R. R. Co. v. Schwindling*, 101 Pa. St. 258 (47 Am. R. 706); *Atchison, etc., R. R. Co. v. Flinn*, 24 Kan. 627.

These cases are to be discriminated from those in which one places dangerous agencies where trespassing children are likely to be injured by them; for here the company did what it was perfectly lawful for it to do, and that was, to run a passenger train in the manner in which such trains are usually managed. The class of cases to which we refer, although

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numerous, have no application here. Of this class the following are representative cases: *Binford v. Johnston*, 82 Ind. 426 (42 Am. R. 508); *Dixon v. Bell*, 5 M. & S. 198; *Lynch v. Nurdin*, 1 Q. B. 29; *Carter v. Towne*, 98 Mass. 567; *Railroad Co. v. Stout*, 17 Wall. 657; *Bird v. Holbrook*, 4 Bing. 628; *Birge v. Gardner*, 19 Conn. 507; *Keffe v. Milwaukee, etc., R. W. Co.*, 21 Minn. 207 (18 Am. R. 393); *Nagel v. Missouri, etc., R. W. Co.*, 75 Mo. 653 (42 Am. R. 418); *Evansich v. Gulf, etc., R. W. Co.*, 57 Texas, 126 (44 Am. R. 586); *Townley v. Chicago, etc., R. W. Co.*, 53 Wis. 626; *Bransom v. Labrot*, 81 Ky. 638 (50 Am. R. 193); *Kansas, etc., R. R. Co. v. Fitzsimmons*, 22 Kan. 686 (31 Am. R. 203).

The cases last cited all recognize the rule that children of tender years are not to be treated as persons of mature years. This is a reasonable and humane rule, and any other would be a cruel reproach to the law; but the law merits no such reproach, for, throughout all its branches, whether of tort or contract, there runs, like the marking red cord of the British navy, a line distinguishing children of years too few to have judgment or discretion, from those old enough to possess and exercise those faculties. This is a doctrine taught by every man's experience, and sanctioned by our law. A departure from it would shock every one's sense of justice and humanity. Cases very closely resembling the present recognize and enforce this distinction, and without substantial diversity of opinion the general principle is recognized, although there is not entire uniformity in its application. Dr. Wharton, in discussing the general subject, says: "The protection of the helpless from spoliation is one of the cardinal duties of Christian civilization; and when those so helpless are young children, this duty is aided both by the instincts of nature and the true policy of the State." Wharton Neg., section 313. Mr. Thompson says: "The general rule is, that where the injury is caused by the actual negligence of the company, the child can be expected to use discretion only

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in respect of its years; and the total incapacity of a child to know the danger, and avoid it, shields it from responsibility for its acts. Greater care, therefore, must be exercised in reference to children than to adults." 1 Thompson Neg. 452. Another author says: "When the trespasser is an infant, the railway company, on the one hand, is held bound to exercise a higher degree of care and caution than is required as to adults, and the infant, on the other hand, is not required to exercise a discretion and prudence beyond its years, but only that measure of sense and judgment which it may reasonably be expected to possess in view of its age." Beach Cont. Neg. 211. Cases in great numbers might be collected supporting the general doctrine declared by these authors, and applying it to almost every conceivable phase of the question, but we deem it unnecessary to cite these cases, as there is little, if any, diversity of opinion. The principle of which we are speaking supplies the initial proposition for this discussion, since it enables us to declare that the conductor was bound to use much greater care in dealing with a child of seven years than he would have been required to exercise respecting an older person. The care exercised by him was not such as under the circumstances it was his duty to exercise. Expelling from the train, miles from its home, a child so young as to be incapable of taking care of itself or of comprehending the danger of its situation, without asking any one to give it attention or look after its safety, was not such care as humanity and justice require; but we do not place our decision upon this point alone, for we think that the conductor's want of care must be taken in conjunction with the wrong of the engineer and those in charge of the freight train, in negligently failing to stop the train when it was within their power to do so before it ran upon the child. These two leading facts, when combined, make a case establishing negligence on the part of the appellant, and excluding contributory negligence on the part of the child. We can not undertake to comment upon all of the many cases

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which declare principles that rule such cases as this, but we deem it not unprofitable to refer to some of the decisions which light our way to a just conclusion.

In *Louisville, etc., R. R. Co. v. Sullivan*, 81 Ky. 624 (50 Am. R. 186), a man, so drunk as to be helpless mentally and physically, was put off a railroad train, on a cold winter night, by a conductor who knew his condition. The passenger so ejected from the train was severely frozen, and in a very strongly-reasoned opinion the company was held liable. The doctrine of this case is perhaps an extreme one, and to be carefully limited, yet it is not easy to answer the reasoning of the court or meet the force of the authorities cited.

In our own case of *McClelland v. Louisville, etc., R. W. Co.*, 94 Ind. 276, the company was held to be not responsible for the killing of a drunken man who was put off the train and wandered back upon the track and was killed; but the theory upon which that case was decided hardly meets the question as presented in this case, or in *Louisville, etc., R. R. Co. v. Sullivan*, *supra*, for the facts are not the same in the two cases.

The court in the case of *Atchison, etc., R. R. Co. v. Weber*, 33 Kan. 543 (52 Am. R. 543), approved this instruction: "Of course the carrier is not required to keep hospitals or nurses for sick or insane passengers, but when a passenger is found by the carrier to be in such a helpless condition, it is the duty of the carrier to exercise the reasonable and necessary offices of humanity toward him until some suitable provision may be made." And it was held that it was proper for the carrier to transport a passenger suffering from *delirium tremens* to one of its stations, and there place him in charge of the overseer of the poor.

Discussing a question somewhat similar to that involved in the cases cited, the Supreme Court of Ohio said: "It might, perhaps, as far as this case is concerned, be conceded that if a man were so intoxicated as to be without reason, sense, or intelligence, it would be unlawful, as it would be inhuman, to expel him from cars at night, where he would be just as

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likely as not to lie down upon the rails and go to sleep. We may concede further, that to put off a drunken man, during a bitterly cold night, in the woods, far from any house, when the probabilities were that he would freeze to death before help could reach him, would be as indefensible in law as it would be wicked and cruel in fact." *Railway Co. v. Valleley*, 32 Ohio St. 345 (30 Am. R. 601).

These are cases, extreme ones it may be, illustrating the doctrine that regard must be had to the helpless condition of one who enters a railroad train, and that those in charge of the train must do no act which is cruel or inhuman. Granting that these cases are extreme ones, still, the general doctrine which they assert is undeniably a sound one, for through all the cases runs the principle that what humanity requires must be done by those who act with knowledge of another's helplessness. *Weymire v. Wolfe*, 52 Iowa, 533; *Northern Central R. W. Co. v. State*, 29 Md. 420; *Walker v. Great Western R. W. Co.*, L. R. 2 Exch. 228; *Swazey v. Union Manfg. Co.*, 42 Conn. 556; *Atlantic, etc., R. R. Co. v. Reisner*, 18 Kan. 458; *Marquette, etc., R. R. Co. v. Taft*, 28 Mich. 289 (opinion of COOLEY, J.); *Terre Haute, etc., R. R. Co. v. McMurray*, 98 Ind. 358 (49 Am. R. 752).

This principle supplies a solid foundation for the rule that the age of a child is an important element to be considered in determining whether the person who injured him was negligent, as well as in determining whether the child himself was guilty of contributory negligence. We know that there are many cases which hold, and rightly hold, that children may be guilty of negligence. *Hathaway v. Toledo, etc., R. W. Co.*, 46 Ind. 25; *Higgins v. Jeffersonville, etc., R. R. Co.*, 52 Ind. 110; 2 Wood Railway Law, 1272, 1273.

A child's age and helplessness may, however, often excuse where one of mature age would be adjudged in fault, and may also often make an act negligent as to him that would not be so as to one of riper years. It is upon this principle that a recent writer—who fortifies his assertion by many

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cases—is sustained in saying: “But there is no presumption that a young child or a drunken person will heed the signals of danger, and the engineer is bound to stop the train if he sees that they make no attempt to leave the track.” 2 Wood Railway Law, 1268n.

Doubtless the rule is to be very guardedly applied to one who voluntarily incapacitates himself, since he himself is guilty of a wrong not easily palliated, and it is not easy for an engineer to distinguish a drunken man from a sober one; but, with respect to a child of seven years of age, it is far otherwise, for nature has incapacitated it and the engineer can readily distinguish from his stature and appearance the difference between it and a person who has attained years of discretion. Illustrating the subject we are discussing, is a decision by a court which has applied with as much strictness as any in the land the law against children, wherein it was held that negligence could not be imputed to a boy nine years of age who had climbed through a train of freight cars and was injured. *Pennsylvania Co. v. Kelly*, 31 Pa. St. 372. In another case in that court it was said: “He acted like a child and like a child he must be judged.” *Rauch v. Lloyd*, 31 Pa. St. 358. In still another case in that court it was held, that where a boy was carried against his will for five miles, and in returning home received injury, the wrongdoer must respond in damages. *Drake v. Kiely*, 93 Pa. St. 492. The case of *Lovett v. Salem, etc., R. R. Co.*, 9 Allen, 557, decides that a railroad company is liable for injury to a child ten years of age, who was wrongfully on a street railway car, and jumped from it, while it was moving rapidly, at the direction of the driver; the court placing its decision upon the ground that the child was young and could not be expected to act as an adult would do.

It was held in *Kline v. Central Pacific R. R. Co.*, 37 Cal. 400, that the company was liable where a boy sixteen years of age leaped from a train upon which he was a trespasser, at a show of force displayed by the conductor, and the prin-

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ciple asserted in *Lovett v. Salem, etc., R. R. Co., supra*, was accepted as the ruling one.

In *Meeks v. Southern Pacific R. R. Co.*, 56 Cal. 513 (38 Am. R. 67), an infant of six or seven years of age was sleeping on the track, and it was held that as those in charge of the train were bound to keep a vigilant watch, the company was liable for injuring the child, that its employees might have seen and rescued from danger.

A very able court, speaking by one of its ablest judges, said, of the duty of an engineer: "If, however, he sees a child of tender years upon the track, or any person known to him to be, or from his appearance giving him good reason to believe that he is, insane, or badly intoxicated, or otherwise insensible of danger, or unable to avoid it, he has no right to presume that he will get out of the way, but should act upon the belief that he might not, or would not, and he should therefore take means to stop his train in time." *Lake Shore, etc., R. R. Co. v. Miller*, 25 Mich. 274. Other cases assert similar doctrines, and to them we refer without further comment. *Baltimore, etc., R. R. Co. v. State*, 33 Md. 542; *Isbel v. New York, etc., R. R. Co.*, 27 Conn. 392; *Isabel v. Hannibal, etc., R. R. Co.*, 60 Mo. 475; *East Tennessee, etc., R. R. Co. v. St. John*, 5 Sneed (Tenn.) 524.

The complaint explicitly avers that there was no negligence on the part of the parents, so that the question turns, so far as the element of contributory negligence is involved, solely upon the conduct of the child.

It is contended that the injury to the child was so remote that it can not be attributed to the negligent act of the appellant. This question has been recently so fully discussed by us that we do not deem it necessary to again enter upon an extended discussion of the subject. *Louisville, etc., R. W. Co. v. Falvey*, 104 Ind. 409; *Terre Haute, etc., R. R. Co. v. Buck*, 96 Ind. 346 (49 Am. R. 168); *Dunlap v. Wagner*, 85 Ind. 529 (44 Am. R. 42); *Billman v. Indianapolis, etc., R.*

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R. Co., 76 Ind. 166 (40 Am. R. 230); *Cincinnati, etc., R. Co. v. Eaton*, 94 Ind. 474 (48 Am. R. 179).

Many of the cases we have here cited assert a doctrine in strict harmony with our own cases, and, indeed, the doctrine is expressly held in the famous Squib case, upon which authors and courts have founded their statements and decisions for many years. In that case no wilful or malicious tort was committed, for the defendant threw the lighted squib in sport, and this, being passed from hand to hand, at last struck the plaintiff's ward, and put out his eye. All the judges agreed that the defendant was liable, although they differed as to whether the action should be case or trespass, one of the judges saying that "Wherever a man does an unlawful act he is answerable for all the consequences." *Scott v. Shepherd*, 2 W. Bl. 892.

There is, in truth, no case that has been recognized as sound, that holds that the rule as to the responsibility of the wrong-doer is different in cases of actionable negligence from that which prevails in cases of wilful or malicious torts. There is a difference as to the measure of damages, for, where the tort is malicious, exemplary damages may be recovered, but such damages can not be recovered in cases of negligence. This consideration has, however, no influence upon the question of a negligent wrong-doer's responsibility for the consequences resulting from his act.

The appellant propounded a question to a person called as a juror, and the trial court refused to permit it to be answered. The record does not properly present the point which the appellant essays to make upon this ruling, as it sets forth only the question asked the juror. In order to enable this court to ascertain whether any injury was done the appellant, the entire examination of the juror should have been brought into the record. *Johnson v. Holliday*, 79 Ind. 151.

The appellee introduced evidence, over the appellant's objection, to prove that he was too poor to employ servants to take care of his children. The objection to this testimony was,

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however, too general to present any question. It is settled that objections must be specific. *Louisville, etc., R. W. Co. v. Falvey*, *supra*, and cases cited.

In one of the instructions given by the court, the pecuniary condition of the appellee, and his inability to employ servants, were submitted to the jury as proper matters to be considered by them. This was error, and, in view of the fact that there was evidence of that character before the jury, prejudicial error. *City of Delphi v. Lowery*, 74 Ind. 520 (39 Am. R. 98), and authorities cited; *Mayhew v. Burns*, 103 Ind. 328; *Rooney v. Milwaukee Chair Co.*, 65 Wis. 397.

In *Hagan's Petition*, 7 Cent. L. J. 311, Judge DILLON used language very similar to that employed by us in *City of Delphi v. Lowery*, *supra*, and that language we quote: "Some of the cases seem to make the liability depend upon the means of the parents, and to countenance a distinction as to contributory negligence between parents able to employ nurses or attendants, and those who are not. This distinction may be doubted; for there is not, in this country, one rule of law for the rich, and a different rule for the poor. It extends its protecting shield over all alike."

As was said in *Mayhew v. Burns*, *supra*, "What some must do, in respect of denying themselves servants, or their children attendants, every other may do, and whether done from choice or necessity, negligence can not be predicated upon the one or excused by the other."

Any other rule would be impracticable as well as unsound in principle. If the pecuniary condition of the parent is accepted as a standard, all is uncertain, for no definite amount of pecuniary means can be taken as a guide, since it would be impossible to determine what a parent should be worth in order to impose upon him the duty of employing nurses or attendants for his children. So, too, such a rule as that for which appellee contends would graduate the number of attendants by the wealth of the parent, and thus lead to inquiries entirely foreign to the merits of the case. But, inde-

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pendent of these considerations, the rule is unsound in principle, because it would impose upon all who use our streets and highways, or who conduct manufactories, or own property, an unjust burden, as it would make them liable to the negligent, and this is a duty that ought not to be imposed upon any one.

The rule which we have adopted is just to all, the rich and the poor alike, and it imposes no hardship upon any one, for it only requires that parents shall be ordinarily prudent and careful, whether rich or poor.

Judgment reversed.

Filed April 14, 1886.

ON PETITION FOR A REHEARING.

ELLIOTT, C. J.—In their brief counsel for appellant say: "We desire a rehearing and modification of the opinion in three particulars:

"1st. The ruling of the court on the question asked of the juror.

"2d. The boy in this case was of sufficient age and experience to be held responsible for the acts committed by him, if he himself were the plaintiff; and as the father is plaintiff he is not in as favorable a position as the boy would have been.

"3d. There was no negligence on the part of the conductor of the passenger train, proximately causing the injury; and as the boy was a trespasser on the track, there was no unperformed duty on the part of the employees in charge of the freight train which caused the injury."

The first point is disposed of by the case of *Johnson v. Holliday*, 79 Ind. 151, cited in our former opinion. We have no doubt that we were right in holding, as we did in that case, that the record must contain, not the single question and the one answer of the juror, but his whole examination. It may well be that other questions and answers would show that no injury was done the appellant. This must be presumed, for it is as plain a rule of law as there is in all the

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books, that an appellant must affirmatively show error in the rulings of the trial court, for, until the contrary is shown, all reasonable presumptions are indulged in favor of those rulings.

We are at a loss to ascertain what is sought by the appellant, for, aside from the proposition just disposed of, we decided but two others, one of these was in its favor, and the other, which was against it, was that the complaint was good. These were the only points decided, and, of course, the only conjecture we can make is, that the appellant is dissatisfied with our ruling upon the complaint, for the general abstract statements made in the counsel's brief do not enable us to very clearly comprehend just what it is that they find fault with. We were careful to say in our former opinion that we did not place our decision upon the wrongful act of the conductor in putting the child off of the train, without consigning him to the care of any one, but "that the conductor's want of care must be taken in conjunction with the wrong of the engineer and those in charge of the freight train, in negligently failing to stop the train when it was within their power to do so before it ran upon the child. These two leading facts," we said, "when combined, make a case establishing negligence on the part of the appellant."

It thus appears that our decision rested on the entire complaint and not on a part of it. As it seems that counsel misunderstand that part of the complaint which describes the manner in which the child was killed, we set it out: "Said child having been thus wrongfully and negligently put off of said train at said point as aforesaid, without being placed in the control or in the custody of any one, and without the fault or neglect of his parents, he, the said Arthur Pitzer, was casually upon the track of said defendant at a point on the line of said railroad, at or near a public highway crossed by said railroad track, about one and one-fourth miles north of said Jackson station; that at said time, which was between the hours of four and five o'clock

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P. M., said defendant was running a locomotive and freight train, which was coming from the south; that while said Arthur Pitzer was upon said track at or near the crossing of said public highway, and on the north side thereof, he could have been distinguished by the servants, agents, and employees of said defendant, then running said locomotive and train of cars, for a distance of three-quarters of a mile, within which distance said locomotive and cars could have been easily stopped, said track being up grade to said crossing from the point where said Arthur could have been distinguished as aforesaid, but that said defendant, its agents, servants and employees, wrongfully, negligently and carelessly, without giving any signal or warning, or in any way attempting to stop said train, and while said child might have been and was seen by the defendant's agents, servants and employees then running said train of cars, ran said locomotive and train of cars over the said Arthur Pitzer."

We think the case presented by the complaint an unusually strong one, and far within the authorities. If the employees of a railroad company see a child of seven years of age upon the track, far enough off to easily stop the train, but, instead of stopping it, negligently run upon it and crush it to death, then, upon the clearest principles of justice and right, the company is liable. In our former opinion we cited many cases sustaining that conclusion. But in this case we have the further element that the conductor put the child off at a station, unattended and uncared for, and without commending him to the care of any person.

We did not depart from our own decisions in affirming, as we did, that more care is required where a child of tender years, or a helpless man, is seen upon the track, than where one who has reached the age of discretion, and appears to be in possession of his faculties, is seen on the track.

In the case of *Pittsburgh, etc., R. W. Co. v. Vining*, 27 Ind. 513, a child of seven years of age was treated as too young

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to be guilty of negligence, and a complaint not nearly so strong as the present was held good. *Lafayette, etc., R. R. Co. v. Huffman*, 28 Ind. 287, does not at all conflict with our conclusion. On the contrary, it gives it strong support, for it was there said: "Thus, if an engineer of a locomotive discovered a young child on the railroad track, he would be required to use greater effort to stop the train than could have been expected from him if he had discovered a grown person in the same situation. In the latter case, he could reasonably depend more upon the judgment and presence of mind of the person on the track to save himself from danger than in the former case."

Surely the appellant can not get any support from the doctrine of the case cited. It might doubtless do so, if the complaint did not negative negligence on the part of the child's parents, but this is expressly negated in the complaint before us. In the case of *Hathaway v. Toledo, etc., R. W. Co.*, 46 Ind. 25, a recovery was denied because there was contributory negligence; but in this case that is expressly negated. The complaint in *Jeffersonville, etc., R. R. Co. v. Bowen*, 40 Ind. 545, was not so strong as the present, and the court said that it could see no objection to it. In *Binford v. Johnston*, 82 Ind. 426, this court asserted that the same rules were not applicable to children as to adults, and the assertion was supported by the citation of many authorities. This principle is also recognized in *City of Indianapolis v. Emmelman*, 108 Ind. 530.

Turning now to the cases cited by the appellant from other courts, we find counsel saying: "In *Scheffler v. Minneapolis, etc., R. W. Co.*, 32 Minn. 518, a child eighteen months of age was killed. Held, the child was a trespasser, and the company was not required to anticipate that it would be on the track." But a moment's reflection must produce the conviction that this doctrine can not apply to a case where the child was seen and distinguished. That we are right in our interpretation of that decision is apparent from the language

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employed by the court in the case referred to, for it was said: "If the engineer had seen him, and then had not exercised proper care to avoid striking him, there would have been a different case. *Locke v. First Division St. Paul, etc., R. R. Co.*, 15 Minn. 350."

In the case of *St. Louis, etc., R. W. Co. v. Freeman*, 36 Ark. 41, the decision, so far as it concerns the question here under discussion, is against the appellant, for it was there held that the company was not responsible, "unless the trainmen, after discovering the child, omit the use of reasonable precaution to avoid the injury." Here the company is responsible, because after having seen the child, they used no precaution at all, although the train might have been easily stopped. The decision in *Prendegast v. New York, etc., R. R. Co.*, 58 N. Y. 652, is also against the appellant, for, to quote the language of the case, "a child of such tender age was clearly *non sui juris*, and his conduct therefore presented no bar to a recovery. *Ihl v. Forty-Second Street, etc., R. R. Co.*, 47 N. Y. 317."

In the case cited by the court in the quotation we have made, the child fell upon the track at a sufficient distance in front of a street car to have enabled a sister, who was with her, to have extricated her, "had the driver," to use the language of the court, "been observant of what was passing and slackened his speed." And it was held that "The conduct of the infant may have an important bearing on the question of the defendant's negligence, but when the latter is clearly negligent, contributory personal negligence on the part of an infant obviously not *sui juris* can not be alleged, unless negligence on the part of his guardian or custodian has brought about the situation, or in some manner contributed to the injury. *Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 455, 460."

In the case cited by the court in the extract just given, it was held that there was a difference between children of tender years and adults, and the cases of *Hartfield v. Roper*, 21 Wend. 615, *Robinson v. Cone*, 22 Vt. 213, and *Daley v.*

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Norwich, etc., R. R. Co., 26 Conn. 591, were cited. It appears, therefore, that when we get to the foundation of the New York case cited, it is against the appellant instead of in its favor upon the material point here involved, namely, whether the trainmen had the right to expect the same care of a child of tender years as from an adult. In the other New York case cited, a boy, described by the court "as a bright, active boy, about seven years of age, considered competent by his parents to go to school and upon errands alone," attempted to run across the track in front of a train approaching a crossing over which he had often gone, and it was held that there could be no recovery. It is obvious that there is a wide difference between that case and this, where the boy was seen on the track in time to stop the train, and where negligence on his part and on that of his parents is directly negatived. *Cauley v. Pittsburgh, etc., R. W. Co.*, 95 Pa. St. 398 (40 Am. R. 664), was a case in which boys got upon a car, and when ordered off by the conductor, while the train was in motion, leaped from it and one was injured. Of this case it is, perhaps, enough to say that it is not in point, but it may be added that it is in direct conflict with many cases, and certainly with one in the same court. *Baltimore, etc., R. R. Co. v. Schwindling*, 101 Pa. St. 258, simply decides, what we strongly asserted in our former opinion, that the railroad company is not liable for an injury to a child on its train as an intruder, because of any negligence in the construction of the road or machinery.

In *Marcott v. Marquette, etc., R. R. Co.*, 49 Mich. 99, the decision was the third one in the case, but it does not touch the point here involved, for it was decided upon the ground that the child was not seen, the court saying: "The engineer was watching the track for obstacles and discovered none." When the case was in the court the second time, it was held that "The lookout upon a locomotive must be as efficient as the circumstances require, and especially so when the chances of access to the track are greater than usual." *Marcott v.*

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Marquette, etc., R. R. Co., 47 Mich. 1. This doctrine is clearly hostile to the appellant's views, and is in harmony with the ruling in *Lake Shore, etc., R. R. Co. v. Miller*, 25 Mich. 274, cited in our former opinion.

The decision in *Chicago, etc., R. R. Co. v. Stumps*, 69 Ill. 409, does not by any means support the appellant's contention. In that case a boy seven years of age climbed on a train and was injured. It was held that there could be no recovery, because there was no negligence on the part of the company, but the court said: "The proof shows appellee was only seven years of age when he sustained the injuries. He was too young to be charged with negligence, and could be held to no care other than such as a child of that age could be expected to exercise for its personal safety. The principal question in the case, therefore, is, whether the employees of the company were guilty of culpable negligence in the management of the train."

In *Bishop v. Union R. R. Co.*, 14 R. I. 314 (51 Am. R. 386), a boy of six years of age wrongfully jumped on a moving car, and was injured in leaving it. It was held that the company was not liable, because the boy was an intruder, and it appeared that, as the court said, "the driver did not see the boy, and knew nothing of the accident." It is impossible for us to perceive what application that case has to the present.

In *Morrissey v. Eastern R. R. Co.*, 126 Mass. 377, a child not seen by the engineer was run over, and it was held that the company was not liable, the court saying: "The defendant corporation owed him no duty, except the negative one not maliciously or with gross and reckless carelessness to run over him." It is apparent from the cases decided by that court, and cited in our former opinion, that had the child been seen in time to have stopped the train by the exercise of reasonable care, the company would have been held liable.

The decision in *Chicago, etc., R. W. Co. v. Smith*, 46 Mich. 504 (41 Am. R. 177), was placed entirely upon the ground

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that there was no negligence on the part of the railway company, the court saying: "In other words the injury resulted from an accidental fall of the boy and without any carelessness or negligence of the company's servants." It is evident from the cases cited in our former opinion, that the Supreme Court of Michigan is far from sanctioning the doctrine asserted by the appellant, and it is perhaps unnecessary to refer to other decisions in that court, but if there were doubt on this subject it would be removed by the opinion of the court, written by Judge COOLEY, in *East Saginaw City R. W. Co. v. Bohn*, 27 Mich. 503. In that case it was held that it was not enough for the conductor of a street railway car to warn a child not to ride on the platform, but that he must employ more efficient means to remove him from danger. The cases of *Hargreaves v. Deacon*, 25 Mich. 1, *City of Chicago v. Starr*, 42 Ill. 174, and *Hughes v. Macfie*, 2 H. & Colt. 744, are not in point, for they belong to an entirely different class of cases from the present.

We have thus patiently, and, perhaps, at unnecessary length, reviewed all of the cases cited by appellant, and find that not one among them all supports the proposition, that where a child is seen upon the track in time to easily check the train, he may be run over and killed without any effort to stop the train.

The authorities, as we feel confident in affirming, all agree that there is a difference between children of tender age and persons old enough to possess judgment and discretion. We sought to make this distinction prominent, for we thought, and still think, that it is of controlling importance. An adult, it may be presumed, will, after warning, leave the track when danger approaches, but this is not presumed where very young children are on the track of a railroad. Where a young child is on the track, it can not be presumed, as in the case of an older person, that he will leave it in time to avoid an approaching train. Under the authorities, it is probable that this complaint would not have been good had Arthur Pitzer

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been old enough to be presumed to exercise judgment and discretion; but it is good, because he was a child of tender years. It was necessary, therefore, to emphasize, as we did, his age, for, had he been of mature years, it might, perhaps, have been presumed by the trainmen that he would have left the track in time to escape the approaching train. But we are not here dealing with the case of a person who had arrived at years of discretion, but with the case of a young child, and we decide nothing that can be considered as applicable to any other case.

We think it very clear, upon the whole complaint, that the damages laid are the proximate result of the appellant's tort. We are also of the opinion that there is such a connection between the conductor's tort in putting the child off of the train, and the wrongful acts of the other employees of the appellant, as makes it proper to unite these acts in one complaint. We are clear, that, upon all the facts pleaded, the complaint makes a case entitling the appellee to compensatory, but not exemplary, damages.

Petition overruled, at the costs of the appellant.

Filed Jan. 12, 1887.

109	199
129	565
109	199
144	118
109	199
148	80

No. 12,545.

LUDLOW, GUARDIAN, *v.* LUDLOW ET AL.

PLEADING.—*Practice.*—*Waiver of Ruling on Demurrer.*—If the defendant answers before his demurrer to the complaint is disposed of, he waives a ruling on the demurrer.

SUPREME COURT.—*Complaint.*—*Assignment of Error.*—If the sufficiency of a complaint is questioned for the first time in the Supreme Court, error must be predicated upon it as an entirety.

QUIETING TITLE.—*Cross Complaint.*—*Tax Deed.*—*Mortgage.*—In a suit to foreclose a mortgage, a cross complaint by a defendant, alleging that he is the owner of the mortgaged property under a tax deed, pursuant to a

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sale antedating the mortgage, and that the other parties to the suit each claim an interest adverse to his title, is sufficient under section 1070, R. S. 1881.

Tax Lien.—*Foreclosure.*—*Rents.*—*Set-Off.*—*Pleading.*—An answer to a complaint to foreclose a tax lien, that the plaintiff wrongfully took and retained possession of the land in controversy, and asking that its rental value be set off against any sum due the plaintiff, but not showing what interest the defendant has in the property or rents, is bad. Each paragraph of a pleading must be complete in itself.

SAME.—*Sale.*—*Limitation of Lien.*—*Mortgage.*—One who takes a mortgage on a tract of land which has been previously sold for taxes assessed upon it and another tract owned by the same person, is not entitled, in an action by the purchaser to enforce his lien, to have the mortgaged land relieved from the lien of the taxes assessed upon such other tract, and to have it confined to the latter.

From the Dearborn Circuit Court.

G. M. Roberts and *C. W. Stapp*, for appellant.

J. K. Thompson, for appellees.

Howk, J.—This was a suit by appellant to foreclose a mortgage on certain real and personal estate, in Dearborn county, alleged to have been executed by appellees Edward S. and Julia E. Ludlow, to the appellant, and to collect the debt secured thereby. It was alleged in appellant's complaint, among other things, that appellee Joseph H. Burkam claimed to have liens upon, and an interest in, the mortgaged real and personal estate, which pretended liens and claims were all inferior to appellant's mortgage lien and were false, and of no virtue and effect whatever, and appellee Burkam was made a defendant to the suit that he might answer as to his interest in such real and personal estate. Appellee Burkam answered by a cross complaint, in two paragraphs. Appellant answered Burkam's cross complaint by a general denial thereof, and by a second, third and fourth special or affirmative answers. Burkam's demurrer to the second, third and fourth paragraphs of appellant's answer to the cross complaint was sustained by the court. The issues joined were heard by the court, and a finding was made for appellant as

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against the appellees Edward S. and Julia E. Ludlow, for the amount due on their note and mortgage, and for the foreclosure of the mortgage, etc. The court further found for appellee Burkam, on his cross complaint, against his co-appellees and appellant, that his tax deed was ineffectual to convey to him the title to the mortgaged property, but that it transferred to him the lien of the State on such property to secure the payment of the amount found due him for purchase-money, taxes paid, penalties and costs, and that such lien was superior and prior to appellant's mortgage lien, and ought to be foreclosed. In accordance with its findings herein, the court made and entered its final judgment and decree.

The first error assigned here by appellant is the overruling of his demurrer to each paragraph of Burkam's cross complaint. It is shown by the record, that appellant filed a demurrer to each paragraph of such cross complaint, and that such demurrer was "argued by counsel, and submitted to and taken under advisement by the court;" but the record wholly fails to show that the court ever made any ruling on such demurrer. The first error, therefore, presents no question for our decision.

Appellant has assigned as error, that the court erred "in neglecting and refusing to pass upon appellant's demurrer to each paragraph of Burkam's cross complaint." No such neglect or refusal of the court is shown by the record of this cause. All that the record discloses on this subject is, that, pending the court's advisement as to his demurrer, appellant effectually waived, as he had the right to do, any ruling on such demurrer by filing his answers to the merits in bar of Burkam's cross complaint. This error, therefore, presents no question for our decision.

Another error assigned by appellant is, that neither paragraph of Burkam's cross complaint states facts sufficient to constitute a cause of action. This assignment of error presents no question here. Where the sufficiency of a complaint or

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cross complaint is called in question for the first time by an assignment of error here, it is settled by our decisions that the alleged error can be predicated only upon the complaint or cross complaint, as an entirety, and not upon the separate paragraphs thereof. *Reyman v. Mosher*, 71 Ind. 596. But if the rule were otherwise, it is clear, we think, that in each paragraph of his cross complaint Burkam stated a cause of action sufficient to withstand a demurrer, and good beyond doubt when challenged for the first time by an assignment of error here.

In each paragraph of his cross complaint Burkam alleged that he was the owner of the mortgaged property, under a tax deed pursuant to a tax sale of the property, which antedated the date of appellant's mortgage thereon, and that his co-appellees and appellant each claimed an interest in such property, which was adverse to Burkam's title thereto. These facts alone were sufficient to make each paragraph of Burkam's cross complaint a good cause of action, even on demurrer, under section 1070, R. S. 1881. The provisions of that section have always been construed liberally by this court. *Second Nat'l Bank v. Corey*, 94 Ind. 457; *Conger v. Miller*, 104 Ind. 592; *Johnson v. Taylor*, 106 Ind. 89; *Rausch v. Trustees, etc.*, 107 Ind. 1.

Appellant has also assigned, as error, the sustaining of Burkam's demurrer to the second, third and fourth paragraphs of his answer to Burkam's cross complaint. Of these rulings, appellant's counsel only complain here, as we understand their argument, of the sustaining of Burkam's demurrer to the third and fourth paragraphs of appellant's answer. In such third paragraph the appellant, for a further partial answer to the second paragraph of Burkam's cross complaint, alleged that appellee Burkam, on the 20th day of February, 1879, took possession of the real estate mentioned in appellant's complaint, without right, and had ever since retained possession thereof; that the annual rental value of such real estate was \$150; that there was then due from Burkam for said rent to said Edward S. Ludlow the sum of \$900, which

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was wholly unpaid; and appellant prayed that said sum might be set off against any amount that might be found due Burkam on his alleged tax lien.

It is very clear, we think, that the court did not err in sustaining Burkam's demurrer to this third paragraph of answer. It fails to show that appellant, at the time this suit was commenced, had or held any interest in the subject-matter of Burkam's cross complaint, or that he or said Edward S. Ludlow then held the claim against Burkam, described in such paragraph. Whatever else might be said of the paragraph of answer we are now considering, it is certain, we think, that it does not show by any of the facts stated therein, that appellant had any interest in or lien upon the property against which Burkam was seeking to enforce his tax lien. Under our code, the rule is well settled that each paragraph of a pleading, whether of complaint, answer or reply, must be perfect and complete within itself, and can not be aided by reference to another paragraph. *McCarnan v. Cochran*, 57 Ind. 166; *Smith v. Little*, 67 Ind. 549; *Entsminger v. Jackson*, 73 Ind. 144; *Lynn v. Crim*, 96 Ind. 89.

In his fourth paragraph, for a further partial answer to the second paragraph of Burkam's cross complaint, appellant alleged, that, on and for a long time before the 19th day of February, 1879, ——— had been the owner and in possession of the real estate described in appellant's complaint, and during such time was, also, the owner and in the possession of a tract of 86 acres of land, particularly described, in Dearborn county; that on the 13th day of August, 1875, said Edward S. Ludlow and his wife mortgaged said 86 acres of land to said Burkam to secure the payment of \$2,500; that afterwards Burkam foreclosed such mortgage, and, under the decree of foreclosure, on the 2d day of February, 1878, he purchased said 86 acres of land at sheriff's sale, for \$3,138.61, and on the 3d day of February, 1879, such land not having been redeemed, he received a sheriff's deed thereof; that on the day last named, the taxes on said 86 acres of land,

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for the years 1874 to 1878 inclusive, were unpaid and a lien upon such real estate to the amount of \$600; that Burkam, for the purpose of avoiding the payment of the tax lien on said 86 acres of land, caused the county treasurer to sell the real estate described in appellant's complaint, at public sale, to satisfy not only the taxes assessed thereon and penalties, amounting to \$—, but also the taxes assessed on said 86 acres of land, and penalties thereon. And appellant further said, that Edward S. Ludlow and his wife mortgaged to appellant, on February 25th, 1879, the real estate described in his complaint to secure the payment of \$783, which was wholly unpaid. Wherefore appellant prayed that the taxes, which were assessed against said 86 acres of land, and all penalties and costs thereon, be adjudged to be a lien on said 86 acres of land; and that the real estate described in appellant's complaint be adjudged to be free from the lien thereof.

We are of opinion, that the facts stated in this paragraph of appellant's answer are not sufficient to entitle him to the relief he asked therein, or to any other equitable relief. Prior to the tax sale to Burkam, the taxes assessed against Edward S. Ludlow were a lien upon all his real estate, including said 86 acres of land; but after such tax sale the lien of the State for all Ludlow's taxes, without regard to what property belonging to him they were assessed on, was transferred to Burkam on the real estate purchased by him at such sale, under and by force of our statute, if his tax deed should prove invalid or ineffectual to convey the title. *McKeen v. Haskell*, 108 Ind. 97. After such tax sale to Burkam, and with constructive notice at least of such sale, and of what might be its consequences, under our tax or revenue laws, appellant took his mortgage on the real estate so purchased by Burkam. It must be held, therefore, we think, that appellant has no grounds, either in law or in equity, so far as he has shown in the fourth paragraph of his answer, for the relief demanded therein.

The evidence on the hearing below was not made part of

Graham v. Babcock *et al.*

the record, nor does it appear therein. In such a case, of course, we can not consider or decide the question of excessive damages, or any other question which arises under the alleged error of the court, in overruling appellant's motion for a new trial.

We have found no error in the record of this cause which authorizes or requires a reversal of the judgment.

The judgment is affirmed, with costs.

Filed Jan. 8, 1887.

No. 10,155.

GRAHAM v. BABCOCK ET AL.

DESCENT.—*Son-in-Law*.—*Heir by Adoption*.—Where a wife dies, without issue, prior to the death of her father, her husband, upon the death of the latter, does not inherit, as by adoption, the share of his estate which the law would have cast upon his wife had she survived her father.

From the Kosciusko Circuit Court.

C. Clemans and *A. C. Clemans*, for appellant.

H. S. Biggs, for appellees.

MITCHELL, J.—It appears from the complaint in this case that Alexander Menzie, late a resident of Kosciusko county, in this State, died intestate in 1881, leaving the appellees, his children and grandchildren, as his only heirs.

The appellant's deceased wife was a daughter of Alexander Menzie. She died without issue some years prior to the death of her father.

This was an action by Graham, the appellant, to obtain partition of certain real estate in Kosciusko county, of which it is alleged Alexander Menzie, the appellant's late father-in-law, died seized.

Graham sets up a claim to inherit the share of Menzie's estate which the law would have cast upon his deceased wife,

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in the event she had survived her father. The claim is, that since the deceased wife would have inherited had she survived her father, now that she is dead, having left no other heirs, the appellant becomes an heir of her father by adoption in her stead.

It is a matter of surprise that such a pretence should have been set up and seriously argued in a court. The claim involves a total misapprehension of the law of descents.

The circuit court very properly sustained a demurrer to the complaint.

The judgment is affirmed, with costs.

Filed Jan. 6, 1887.

109	206
181	110
109	206
150	665

No. 12,007.

TABER v. GRAFMILLER ET AL.

CITY.—Sidewalk.—Improvement.—Resolution.—For a resolution adopted by the common council of a city, which is held sufficient to authorize a sidewalk improvement, see opinion.

SAME.—Description of Improvement.—Sufficiency of Resolution.—It is sufficient if the resolution provides that the improvement shall be of a designated character, and contains enough to constitute the basis for letting the contract, without specifying with particularity of detail what such improvement shall be.

SAME.—Plans and Specifications.—Civil Engineer.—Presumption.—It is the statutory duty of the city civil engineer to prepare plans and specifications of proposed street improvements, and it will be presumed that he prepares them in proper time and conformity to the ordinances. *Smith v. Duncan*, 77 Ind. 92, questioned.

SAME.—“Street” Embraces “Sidewalk.”—The word “street” is a generic one, embracing sidewalks, and under an authority to improve streets a municipal corporation may improve sidewalks.

SAME.—Agricultural Land.—Assessment.—Land within the limits of a city, although held for agricultural purposes, is subject to local assessments for street improvements.

From the Allen Circuit Court.

T. E. Ellison, for appellant.

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ELLIOTT, C. J.—The appellant sought by this suit to restrain the city of Fort Wayne from enforcing an assessment proposed to be made for the cost of constructing a sidewalk.

The resolution adopted by the common council reads thus :

“A RESOLUTION

“To grade and pave with brick the sidewalks on both sides Baker street, from Webster street to Fairfield avenue :

“BE IT RESOLVED by the common council of the city of Fort Wayne (two-thirds of the members thereof concurring), that the sidewalks on both sides of Baker street, from Webster street to Fairfield avenue, be graded to a width of 10 feet, and paved with brick to a width of 6 feet ; and be it further

“*Resolved* (this council hereby declaring such improvement necessary), That the costs and expenses thereof be assessed against, and collected from, the owners of lots or lands bordering on said sidewalks, according to the provisions of sections 68, 69, 70 and 71 of the act of the General Assembly of the State of Indiana, approved March 14th, 1867, for the incorporation of cities, and that said improvement shall be made under the supervision, and to the satisfaction, of the city civil engineer, and in accordance with plans and specifications on file at the office of said engineer ; and be it further

“*Resolved*, That the city civil engineer set the proper stakes, and advertise for two days in each of two successive weeks, in the Fort Wayne Daily Sentinel and Tri-Weekly Staats Zeitung, that sealed proposals will be received by this council, at a meeting to be held on the — day of —, 188—, for the execution of said work.”

We think that this resolution was sufficient to authorize the improvement described in it. We do not understand that it is necessary to describe the character of the improvement in detail, but we think that it is sufficient to provide that the

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improvement shall be of a designated character, without specifying with particularity of detail what it shall be.

We do not regard the case as within the rule declared in *Smith v. Duncan*, 77 Ind. 92, for there is here no delegation of authority; nor is it within the decision made in *Merrill v. Abbott*, 62 Ind. 549, for there is here a specification of the nature of the work which it is ordered shall be done at the expense of the property-owners.

There is here, what was said in *Merrill v. Abbott*, *supra*, to be necessary, "a general direction as to the plan of the work," for the resolution clearly implies that there is an existing grade properly established. *Wren v. City of Indianapolis*, 96 Ind. 206, see p. 218. There is certainly enough in the resolution to constitute a basis for letting the contract, and this, as decided in *Merrill v. Abbott*, *supra*, is what the law requires.

The fact that no plans or specifications were on file in the office of the city engineer, at the time the resolution was adopted, did not vitiate the resolution, for nothing was delegated to him, nor any discretion that ought to be exercised by the common council confided to him. The presumption is that such plans and specifications were on file in time to permit proper bids to be made, and that they conformed to the ordinances of the common council. It must be presumed that the engineer did his duty, and prepared proper plans and specifications conformably to the city ordinances. We concur fully in the doctrine declared in *Ray v. City of Jeffersonville*, 90 Ind. 567, that the duty of preparing plans and specifications is a ministerial one, vested by law in the engineer.

It is no part of the duty of the common council to prepare plans and specifications, for the law expressly devolves that duty upon the civil engineer. R. S. 1881, section 3073. The common council can no more perform the duties of the civil engineer than can he perform the duties of the common council, for the fundamental law prescribes the duties of city officers, and must be obeyed. If the case of *Smith v. Duncan*,

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supra, can be said to conflict with this view, then, to that extent, it is not approved.

Where the ordinance or resolution specifies that the pavement shall be of brick, it is sufficiently certain, for the just and reasonable implication is, that the brick shall be paving brick of the kind ordinarily used. It would serve no useful purpose, nor benefit the property-owners, to specify in detail the size and quality of the brick, and it would impose a needless burden upon the municipal corporation, and invite profitless litigation.

The word "street" is a generic one, and embraces sidewalks. Under an authority to improve streets, a municipal corporation may improve sidewalks. *City of Kokomo v. Mahan*, 100 Ind. 242; *State v. Berdetta*, 73 Ind. 185 (38 Am. R. 117); 2 Dillon Munic. Corp. (3d ed.), section 780, n. 1.

Land within the limits of a city, although held for agricultural purposes, is subject to local assessments for street improvements. The statute on the subject of taxing such lands does not apply to assessments for the cost of improving streets on which the land abuts. *Leeper v. City of South Bend*, 106 Ind. 375; *Kalbrier v. Leonard*, 34 Ind. 497.

We have examined and decided only such questions as have been presented to us, and our decision is authoritative upon no others.

Judgment affirmed.

Filed Jan. 11, 1887.

No. 13,075.

McKINSEY v. McKEE.

CONTINUANCE.—*Refusal to Grant.*—*Harmless Error.*—Where a party is not injured by the overruling of a motion for a continuance, there can be no reversible error.

SAME.—*Absent Witness.*—*Diligence.*—To entitle a party to a continuance

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144	434

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152	604
153	605

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on account of the absence of a witness, he must show that he has exercised proper diligence to obtain the testimony of such witness.

PRACTICE.—*Objection to Evidence.*—A general objection to the admission of evidence presents no question on appeal.

INSTRUCTIONS TO JURY.—*Exceptions.—Bill of Exceptions.—Practice.*—Where instructions upon which error is sought to be predicated are made part of the record by a bill of exceptions, what occurred in the way of exceptions to the giving or refusal of such instructions, must be stated in the bill as facts and be authenticated by the signature of the judge.

From the Clinton Circuit Court.

P. H. Dutch, for appellant.

U. J. Hammond and *J. C. Farber*, for appellee.

ZOLLARS, J.—Appellee brought this action for the recovery of damages occasioned by the seduction of his daughter.

One of the grounds upon which appellant asks a reversal of the judgment is, that the court below erred in overruling his motion for a continuance of the cause over the term.

At the time the motion for a continuance was overruled, the court ordered an attachment for one of the absent witnesses. During the trial, that witness was brought into court and gave his testimony. Without stopping to inquire as to whether or not that testimony was material, and as to whether or not, in any event, there might have been available error in the overruling of the motion for a continuance on account of the absence of that witness, it is sufficient here, that appellant suffered no injury by the ruling. In such a case, it is the duty of this court to disregard technical errors, and affirm the judgment. *R. S. 1881, sections 398, 658; Rothrock v. Perkinson, 61 Ind. 39; Ricketts v. Harvey, 106 Ind. 564; Davis v. Reamer, 105 Ind. 318; Landwerlen v. Wheeler, 106 Ind. 523; Powers v. State, 87 Ind. 144; Brown v. State, 105 Ind. 385; Chicago, etc., R. R. Co. v. Hedges, 105 Ind. 398; Louisville, etc., R. W. Co. v. Krinning, 87 Ind. 351.*

Again, without deciding as to whether or not it is shown that the testimony of the other absent witness would have

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been competent, it is enough to say, that there was not sufficient diligence as to that witness, to entitle appellant to a continuance. It is stated in the affidavit filed in support of the motion for a continuance, that the witness formerly lived with his father at Colfax, in this State; that appellant ordered a subpoena for him, which was returned, "served by copy," and that he now resides at Clermont, Ohio. It is not shown for how long a time he has resided in Ohio, nor for how long a time appellant had knowledge of his residence there. For aught that appears, he resided in Ohio at the time the subpoena was issued and for a long time prior thereto; that appellant had knowledge of that fact, and had ample time to have taken his deposition before the case was called for trial. *McDermott v. State*, 89 Ind. 187.

It is insisted also, that the court below erred in the admission of certain testimony. At one place in the record, it is stated simply that appellant objected, but no ground of objection was pointed out. At another place, it is recited that he objected to the evidence on the ground of incompetency. These were not such objections as saved any question for review here. *City of Delphi v. Lowery*, 74 Ind. 522; *Lake Erie, etc., R. W. Co. v. Parker*, 94 Ind. 91; *Grubbs v. Morris*, 103 Ind. 166; *Shafer v. Ferguson*, 103 Ind. 90; *Indiana, etc., R. W. Co. v. Cook*, 102 Ind. 133; *McClellan v. Bond, etc.*, 92 Ind. 424; *Louisville, etc., R. W. Co. v. Falvey*, 104 Ind. 409; *Byard v. Harkrider*, 108 Ind. 376; *Louisville, etc., R. W. Co. v. Jones*, 108 Ind. 551.

Questions are made as to the correctness of instructions, which it is said were given by the court, and as to others asked by appellant, and which it is said the court refused. From the record before us, it can not be determined that any of the instructions asked by appellant were refused, nor that there were any proper exceptions to such refusal, or to the giving of the court's instructions.

This court must dispose of the case upon the record, and

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can not say that the court below committed errors for which the judgment must be reversed, unless such errors are made manifest by the record properly authenticated. We find in the bill of exceptions embodied in the record, the following statement: "The court gave to the jury the following instructions, to wit."

Following this statement, the instructions are set out. Following them is this: "Defendant, by his attorneys, asks the court to instruct the jury in writing, and to give the following instructions."

Here follow the instructions so asked. And following these, again, are instructions from 4 to 13, both inclusive. And still following those, are instructions 1, 2 and 3. At the end, it is recited that appellant presented the bill of exceptions and asked that it should be signed and made a part of the record. Following the signatures of his attorneys, is the signature of the judge, as follows: "Signed May 8, 1884. Joseph C. Suit, Judge C. C. C."

Sections 533 and 535, R. S. 1881, provide a mode of preserving exceptions to the giving or refusal of instructions, and of making the exceptions and instructions a part of the record, without a bill of exceptions. That mode was not followed in this case. *Childress v. Callender*, 108 Ind. 394; *Behymer v. State*, 95 Ind. 140. Here, as we have seen, the instructions were brought into the record by a bill of exceptions. In such a case, what occurred in the way of exceptions to the giving or refusal of instructions, must be recited and stated in the bill as facts, and be authenticated by the signature of the judge. *Choen v. State*, 85 Ind. 209; *Powers v. State*, 87 Ind. 144.

Following, and at the end of some of the instructions given by the court, there is this statement, signed by appellant's counsel: "Given by the court and excepted to by the defendant at the time."

And following, and at the end of some of the instructions

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asked by appellant, is the statement, signed by his counsel: "Refused and excepted to at the time by defendant." These are not statements by the court, authenticated by the signature of the judge.

The statement that the court gave certain instructions, is an authentic statement that the instructions set out were given by the court, and nothing more. It is not a statement that there were any exceptions by appellant, or any one else, to the giving of the instructions. The exceptions noted at the end of the instructions, and signed by appellant's counsel, are not a part of them. And so, it is recited in the bill, as we have seen, that appellant asked the court to give to the jury the "following written instructions," but that is not a statement that any of them were refused, nor that there were any exceptions by appellant to such refusal.

The statement, "refused and excepted to," is no part of the instructions. In short, there are no statements, authenticated by the signature of the judge, that any instructions were refused, nor that any exceptions were taken.

The only statements are, as already stated, that certain instructions, set out, were given by the court, and that appellant asked certain instructions, also set out in the bill.

The probabilities are, that, as was the custom, and the proper method, before the adoption of the code of 1881, appellant's counsel wrote under the instructions, or upon the margin, that certain instructions were given and others refused, and that he excepted, but there is nothing in the bill of exceptions by way of a statement, that some of the instructions were in fact refused, and that appellant in fact excepted to such refusal, and to the giving of any of the instructions.

We may state, in passing, that we have examined the instructions given, and those refused, and that so far as pointed out in argument, we discover nothing that would justify a reversal of the judgment. One of the instructions, desig-

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nated by counsel as number 3, is somewhat confused, and apparently foreign to the case, but taken in connection with the others given, it is not at all probable that the jury were in any way confused or misled thereby.

Judgment affirmed, with costs.

Filed Jan. 11, 1887.

No. 12,889.

SIMS ET AL. v. BURK.

DEED.—Cancellation.—Contract.—Rescission.—Cross Bill.—When Court Should Direct Filing of.—B. was induced to convey to S., by warranty deed, a tract of land owned by him and a tract owned by M., by an agreement of S. to pay the purchase-money for the former tract and the amount of a mortgage held on the latter tract by B., and to pay M. the balance of the agreed price of his land, M. thereupon to convey the same to B.; S. failed to pay M. and he refused to convey to B. Suit by B. to rescind the contract and to cancel his deed.

Held, that B. is entitled to the relief prayed, unless upon a cross bill, M. compels the execution of the contract between himself and S., and that, all the parties being in court, the filing of such cross bill should have been directed in order that the whole controversy might be determined.

From the Montgomery Circuit Court.

W. H. Thompson, J. West and W. B. Herod, for appellants.
E. C. Snyder, T. H. Ristine and H. H. Ristine, for appellee.

MITCHELL, J.—Burk brought suit against Sims and wife to procure the cancellation of a deed made by the plaintiff below to Mrs. Sims. Mason was made a party defendant.

The complaint discloses the following facts: In September, 1884, Burk owned a certain fourteen-acre tract of land in Montgomery county. He contracted to sell the land to Sims for \$420.

Mason at the same time owned a six-acre tract adjoining

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that owned by Burk. He in like manner sold his tract to Sims for the agreed price of \$300.

Burk, having previously owned the six-acre tract, held an unpaid purchase-money mortgage on this tract, to secure a debt due from Mason to him for \$180.

It was mutually agreed between all the parties, that Burk should convey both the fourteen and six-acre tracts to Mrs. Sims; Mason agreeing that he would convey the six-acre tract owned by him to Burk. Sims agreed to pay the latter \$600, which was to liquidate the purchase-price of the fourteen acres, and the \$180 mortgage due from Mason to Burk. Sims also agreed to pay Mason \$120, the balance of the purchase-price of the six-acre tract, after paying off and releasing the Burk mortgage.

Pursuant to this arrangement, Burk made a warranty deed to Mrs. Sims for the twenty acres. Sims paid and secured to Burk \$600, as agreed, but failing to receive the \$120 due him from Sims under the arrangement above stated, Mason refused to deliver the deed to Burk for the six-acre tract. Thereupon Burk tendered back what he had received from Sims, and brought this suit to rescind the contract, and cancel his conveyance to Mrs. Sims.

The court overruled a demurrer to the complaint.

Sims and wife answered to the effect, that Burk agreed to purchase and pay for the six-acre tract of Mason, and convey it to Mrs. Sims, as had been done, and that he, Sims, owed Mason nothing. Otherwise the facts stated in the answer did not differ materially from those stated in the complaint.

The court, upon request, found the facts specially, and stated conclusions of law thereon.

The facts are found substantially as they are stated in the complaint. From the special finding it appears that the refusal of Mason to convey the six acres to Burk resulted entirely from the default of Sims, in failing to pay the \$120 due Mason on the purchase-money.

Sims *et al.* v. Burk.

The conclusions of law stated by the court were, that Burk was not entitled to a rescission of the contract or the cancellation of the deed, except as to his covenants of warranty in respect to the six acres, which Mason refused, for the reasons stated, to convey. A decree was entered accordingly. Both parties excepted to the conclusions of law stated by the court. Sims and wife have appealed. Errors and cross errors are assigned by the parties respectively.

On behalf of the appellants, it is contended that upon the facts, as stated in the complaint and found by the court, Burk was entitled to no equitable relief whatever, while the appellee claims that he was entitled to have the deed cancelled absolutely.

Upon the facts as found, it clearly appears that the appellee Burk was induced to make a warranty deed for six acres of land which he neither owned nor claimed to own, upon the faith that Sims would carry out his agreement and pay Mason \$120, the balance of the purchase-price. In consequence of Sims' refusal to pay according to the agreement, Mason, as was his right, refused to convey to Burk. This left the latter in the situation of having given a warranty deed to Mrs. Sims for land to which he had no shadow of title, and exposed him to the liability of being harassed by a suit on his covenant of warranty; this too, without any fault on his part, and because of the failure of the appellant Sims to perform his engagement with Mason. Clearly, Burk was entitled to be relieved from the embarrassment into which he had thus come without fault on his part. This being so, he could only be relieved by going into a court of equity. He had no remedy so far as we can perceive in a court of law. He elected, as he had the right to do, to ask the court to relieve him by decreeing a rescission of the contract. Having offered to rescind and place the other parties *in statu quo*, Burk was entitled to be placed in the same situation he was in before the deed to Mrs. Sims was made,

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unless upon a cross bill Mason chose to compel the execution of the contract between himself and Sims.

Upon the facts as found, we do not clearly see the propriety of the decree made by the court below. The parties having all been before the chancellor, the controversy between them should have been completely determined. As it now stands, further litigation between Mason and Sims must necessarily result, while all the parties will, meanwhile, occupy an anomalous position. The court below should have directed the filing of a cross bill by or on behalf of Mason against Sims, so as to have settled their rights respectively, as upon the determination of the controversy between them depends largely the ultimate relief to which Burk may be entitled.

Looking at the whole record and considering the errors and cross errors assigned, we have concluded to reverse the judgment below, each party to pay one-half the costs of the appeal.

A new trial is ordered, and further proceedings directed in the court below not inconsistent with this opinion.

Filed Jan. 8, 1887.

No. 12,596.

LAVERTY v. THE STATE, EX REL. HILL, DRAINAGE COM-
MISSIONER.

ASSIGNMENT OF ERROR.—*Sufficiency of Complaint.*—An assignment of error, that “the complaint does not state facts sufficient to constitute a cause of action,” is not available for the reversal of the judgment, unless some fact essential to the existence of the cause of action has been wholly omitted from the complaint.

DRAINAGE.—*Assessment.*—*Complaint to Enforce.*—In a suit for the collection of a drainage assessment, all that the complaint need show concerning the proceedings for the establishment of the ditch are, that some notice

109	217
126	488
109	217
129	661
109	217
131	200
109	217
149	369
109	217
156	386
109	217
162	489
109	217
163	118
109	217
171	709

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was given of the filing of the petition; that the petition was filed; that the commissioners reported the benefits and damages assessed; that the report was approved by the court, and that a copy of the assessment against the defendant is made part of the complaint. *Scott v. Brackett*, 89 Ind. 413, distinguished.

SAME.—*Trial by Court.*—*Jury.*—Suits for the collection of drainage assessments are triable by the court and not by a jury. Section 4276, R. S. 1881, and the amendatory act of 1883, Acts 1883, p. 176; also, section 409, R. S. 1881.

SAME.—*Damages.*—*Set-Off.*—*Counter-Claim.*—Damages alleged to have been sustained by reason of the failure of the drainage commissioner to construct and complete the work as petitioned for, are not a proper subject of counter-claim or set-off by the defendant in a suit by such commissioner to enforce an assessment of benefits.

PLEADING.—*Striking Out.*—*Bill of Exceptions.*—*Practice.*—*Supreme Court.*—To present any question on appeal, upon a ruling striking out a pleading, such pleading must be brought back into the record either by a bill of exceptions or an order of the court.

From the Vermillion Circuit Court.

S. D. Puett, H. E. Hadley and V. Carter, for appellant.

D. H. Maxwell and H. Daniels, for appellee.

HOWK, J.—This suit was commenced in the Parke Circuit Court by appellee's relator, as drainage commissioner of Parke county, to collect a balance alleged to be due on certain assessments, for the construction of a ditch or drain, by enforcing the statutory lien thereof on certain real estate particularly described, in such county, owned by appellant.

After the cause was put at issue, the venue thereof, on appellant's motion, was changed to the court below. There, the issues joined were heard by the court, and a finding was made in favor of appellee's relator, in the sum of \$1,718.11, that, as drainage commissioner, he had a lien under the statute on the real estate described in his complaint to secure the payment of such sum of money, and that such lien ought to be foreclosed. Over appellant's motion for a new trial, the court made and entered a decree in the relator's favor, substantially in accordance with its finding herein.

The relator's complaint is challenged by appellant only by

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his assignment here, as error, that it "does not state facts sufficient to constitute a cause of action." A demurrer to the complaint, for the alleged want of sufficient facts, was overruled below, but no exception was saved to this ruling, and, of course, even if it were erroneous, this ruling would not be an available error for the reversal of the judgment. Appellant's assignment of error here, that "the complaint does not state facts sufficient to constitute a cause of action," is authorized, impliedly at least, by the provisions of section 343, R. S. 1881, to the effect, substantially, that an objection to the complaint, on that ground, shall not be deemed to have been waived by the failure of the party merely to make such objection, either by demurrer or by an answer. But it must be borne in mind that such an assignment of error questions the sufficiency of the facts alleged to constitute a cause of action, after they have been strengthened by the curative virtues of the verdict or finding thereon, and when they are aided and supported by all the presumptions indulged by this court in favor of the rulings and decisions of the trial court. When thus questioned, it must appear that material facts, essential to the existence of the cause of action attempted to be stated, have been wholly omitted from the complaint, before this court would be authorized to reverse the judgment below for any error predicated on such complaint. *Baltimore, etc., R. R. Co. v. Kreiger*, 90 Ind. 380; *Kinney v. Dodge*, 101 Ind. 573; *Smith v. Smith*, 106 Ind. 43.

In his complaint, appellee's relator alleged that at the ——— term, 188—, of the Parke Circuit Court, Joseph J. Daniels, Aquilla Lavery and others, after due notice given of more than twenty days, filed their petition in such court asking an order for drainage, which petition upon proper showing was granted, and the drainage commissioners were ordered to view the proposed work, and make report thereof to such court; that such drainage commissioners made their report, which was favorable to such petitioners, and determined upon the method of drainage, and established the ter-

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mini, route, location and character of the proposed ditch, and the assessments for benefits and injury to the several tracts of land mentioned in such petition, which report was approved and confirmed by such court, and a copy of such report was filed with and made a part of such complaint; and that thereupon the work prayed for was ordered by such court, and appellee's relator was, by such court, ordered and directed "to construct and make the proposed work."

And the relator averred that afterwards, to wit, on the — day of —, 188—, by publication in the "Rockville Republican," a weekly newspaper published in such county of Parke, such relator gave notice to appellant of his having been assessed, in the aggregate sum of \$6,903.58, on his several tracts of land mentioned in such petition, as benefits by the construction of the work prayed for and ordered; that the relator also gave appellant notice in person, that, in thirty days from the dates of the notices so given, such relator would call on appellant for twenty per cent. of such sum, and, on each successive thirty days thereafter, would call on him for a like sum, until the whole amount should have been paid, and that he would give appellant notice of the times and places of such payments, in person or by written notice; that the relator also filed in the recorder's office of such county of Parke his notice (whereof a copy was filed with and made a part of such complaint) of the lien of said several assessments against appellant's tracts of land, situate in Parke county, and severally described as follows: (Description omitted.)

The relator further averred that he only in person gave such notices, and, in accordance therewith, called upon appellant at the stated times, after the lapse of thirty days, for the several percentage amounts, on such total assessments, as they became due after such notices respectively, until he had so called for the sum total of the original assessments; that, for the purpose of the completion of the work and to pay for the work completed, it was necessary that the balance of

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such assessments should be collected; that of the aggregate original assessment of \$6,903.58, appellant had paid the sum of \$5,315.41, leaving a balance due of \$1,588.17, as the sum necessary to make the full amount assessed; that such balance of \$1,588.17 appellant had wholly failed and refused to pay, and that such sum remained due and wholly unpaid. Wherefore, etc.

In discussing the alleged insufficiency of the relator's complaint, appellant's counsel say: "There is no averment in the complaint showing that, at the time of filing the original petition, a day was fixed and noted thereon for the docketing of the same; it does not show that twenty days' notice of the filing of such petition, by posting up notices in three public places, in each township where the lands were situated, near the line of the proposed work, and one at the court-house door in the county wherein the lands are situated, had been given as the statute required. It does not show that three days' time was given, after the docketing of the petition, for remonstrance. It does not show that the court, before which the petition was pending, found that notice of intention to present the petition had been given, as provided by statute. It is not shown that the court made an order, referring such petition to the drainage commissioners, or that the court fixed a time and place for the meeting of such commissioners and a time when they should make their report. There is no allegation that the clerk delivered to such commissioners a copy of such petition and order, nor that they met at the time and place fixed by the court."

"All these facts were necessary," appellant's counsel say, "in order to confer jurisdiction on the court ordering the improvement; and, in a proceeding to enforce a lien for such improvement, the complaint must show them, so that the trial court may know whether or not such court had jurisdiction."

In support of their position, counsel cite and rely upon *Scott v. Brackett*, 89 Ind. 413, and it must be conceded that the opinion of the court in that case seemingly, at least, sanc-

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tions and supports the views and claims of counsel. That case, however, differs from the one we are now considering in one important and controlling particular. In that case, the appellants made a direct attack upon the validity of the proceedings and judgment for the establishment of the ditch, by their petition or written motion, for causes stated therein, to vacate the proceedings and set aside the judgment. The case in hand, however, is strictly collateral to the suit or proceeding, mentioned in the relator's complaint, for the establishment of the ditch. As applied to the relator's complaint, in this collateral suit, not one of the many objections thereto, suggested by appellant's counsel, is well taken or can be sustained. If the proceedings for the establishment were in fact defective and open to objection, upon any of the grounds suggested by counsel, it devolved upon appellant to show it by full and positive averment and proof, and not by suggestions merely. This is settled by our decisions in cases, such as this, of collateral attack upon the proceedings and judgments in other causes. *Exchange Bank v. Ault*, 102 Ind. 322; *Baltimore, etc., R. R. Co. v. North*, 103 Ind. 486; *Cassady v. Miller*, 106 Ind. 69; *Indiana, etc., Co. v. Louisville, etc., R. W. Co.*, 107 Ind. 301.

In suits for the collection of drainage assessments, such as the case under consideration, all that the complaint of the plaintiff's relator need state or show, of or concerning the original proceedings and judgment for the establishment of the ditch, are (1) that some notice was given of the filing of the petition for the ditch, (2) the filing of such petition, (3) the report of the commissioners of drainage of the benefits and damages assessed, and (4) that such report was approved and confirmed by the judgment of the court, and (5) a copy of the assessment against the defendant, in all cases, must be either set out in, or filed with and made part of, such complaint. In all these particulars, the relator's complaint herein was amply sufficient in its averments to withstand a demurrer thereto for alleged want of facts, and was good beyond

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all room for doubt even, when challenged as it is, for the first time, by an assignment of error here. *Helphenstine v. Vincennes Nat'l Bank*, 65 Ind. 582; *Moss v. State, ex rel.*, 101 Ind. 321; *Jackson v. State, etc.*, 103 Ind. 250; *McMullen v. State, ex rel.*, 105 Ind. 334; *Pickering v. State, etc.*, 106 Ind. 228.

Under the alleged error of the court, in overruling appellant's motion for a new trial, it is first insisted by his counsel that the finding of the court was not sustained by sufficient evidence. Without examining this subject in detail, we think we can safely say that there is evidence in the record, which fairly tends to sustain, and does sustain, the finding of the court on every material point, while there is an absolute dearth of evidence in conflict therewith. We can not disturb the finding or decree on the evidence. It was fairly shown by the evidence, that the relator had fully complied with the requirements of the amended section 6, of the amendatory drainage act of March 8th, 1883. Acts of 1883, p. 179. In the amended section 8, of such amendatory act, it is declared that "collections of assessments shall not be defeated by reason of any defect in the proceedings occurring prior to the judgment of the court confirming and establishing the assessment of benefits and injuries, but such judgment shall be conclusive that all prior proceedings were regular and according to law. Nor shall any person be permitted to take advantage of any error, defect, or informality, unless the person complaining thereof is directly affected thereby, at any stage of the proceedings," etc. Acts of 1883, *supra*.

In the light of these statutory provisions, there is absolutely no evidence, in the record of this cause, which tends even remotely to defeat the relator's right of recovery of the balance due of the benefits assessed against appellant's lands.

Appellant also insists, that the court below erred in denying him a trial by jury of the issues joined in this cause. This question can not be regarded as an open one, in this

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court. In section 4276, R. S. 1881, being section 4 of the drainage act of April 8th, 1881, and in such section 4 as amended by the amendatory drainage act of March 8th, 1883 (Acts of 1883, p. 176), it was and is expressly provided that certain questions of fact, presented by remonstrance in the original proceedings for the establishment and construction of the ditch, "shall be tried by the court without a jury."

In *Anderson v. Caldwell*, 91 Ind. 451 (46 Am. R. 613), it was held by this court upon full consideration, that this statutory provision for the trial of questions of fact, in drainage proceedings, by the court without a jury, is constitutional. Upon this point, the case cited has been approved and followed in our more recent decisions. *Indianapolis, etc., G. R. Co. v. Christian*, 93 Ind. 360; *Ross v. Davis*, 97 Ind. 79; *Neff v. Reed*, 98 Ind. 341; *Drebert v. Trier*, 106 Ind. 510.

Of course, this case is not a proceeding for the establishment of a ditch, but it is ancillary thereto, and seems to us to come fairly within the spirit and reason of the statutory provision for the trial of questions of fact by the court without a jury. The speedy hearing and decision of suits for the collection of assessments of benefits from the establishment and construction of the ditch are just as essential and important as the speedy hearing and decision of any question of fact arising in the proceedings. Besides, suits for the collection of ditch assessments, and the enforcement by foreclosure of the statutory lien thereof on the lands affected thereby, are, and always have been, and in the nature of things must be, suits of equitable cognizance, and, therefore, triable by the court, and not by a jury, under the provisions of our civil code. Section 409, R. S. 1881; *Lake Erie, etc., R. W. Co. v. Griffin*, 92 Ind. 487; *Lake v. Lake*, 99 Ind. 339; *Lake Erie, etc., R. W. Co. v. Griffin*, 107 Ind. 464.

Appellant's counsel also complain of the decisions of the court below, in sustaining relator's demurrers to the third and fourth paragraphs of answer herein. There was no error, we think, in either of these rulings. The third paragraph

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was in the nature of a counter-claim, and the fourth paragraph was an answer of set-off; and in each of these paragraphs appellant alleged that he had sustained damages by reason of the relator's failure to construct and fully complete the work "as petitioned for," and asked that his damages might be set off against any balance found due on his assessments of benefits. These damages, if sustained, were not proper subjects either of counter-claim or set-off against the relator, as commissioner of drainage, or against the lien he is seeking to enforce herein. *Indianapolis, etc., G. R. Co. v. State, ex rel.*, 105 Ind. 37.

Complaint is also made here, on behalf of appellant, of the ruling of the court below in striking out his so-called plea in abatement herein. After appellee's motion to strike out such plea in abatement was sustained by the court, the plea was not brought back into the record or made part thereof, either by a bill of exceptions or an order of court. Under our decisions, therefore, the ruling complained of is not so presented by the record of this cause, as that it can be considered here. *Berlin v. Oglesbee*, 65 Ind. 308; *Stott v. Smith*, 70 Ind. 298; *Dunn v. Tousey*, 80 Ind. 288; *Peck v. Board, etc.*, 87 Ind. 221.

Some other matters are complained of here on appellant's behalf, none of which, however, would authorize a reversal of the judgment.

Upon the entire record of this cause, our conclusion is that the questions involved have been fully and fairly heard and correctly decided by the court below. In such a case, the statute requires that the judgment below, without regard to any defects of form, variances or imperfections in the record, should be in all things affirmed. Section 658, R. S. 1881.

The judgment is affirmed, with costs.

Filed Jan. 11, 1887.

VOL. 109.—15

The State v. Kinder.

No. 13,426.

THE STATE v. KINDER.

CRIMINAL LAW.—Assault.—Indictment.—Under section 1910, R. S. 1881, an affidavit charging, after the date and venue, that the defendant “did then and there, having the present ability to do so, unlawfully attempt to commit a violent injury upon the person of” the affiant, contrary, etc., is sufficient as charging an assault.

From the Tipton Circuit Court.

J. M. Fippen, Prosecuting Attorney, for the State.

NIBLACK, J.—This prosecution was commenced before a justice of the peace upon the following affidavit, which was duly subscribed and sworn to before the justice :

“The State of Indiana v. Joseph Kinder. John Fennell, being duly sworn, on his oath says, that at the county of Tipton, in the State of Indiana, on the 16th day of September, A. D. 1885, one Joseph Kinder did then and there, having the present ability to do so, unlawfully attempt to commit a violent injury upon the person of John Fennell, this affiant, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana.”

Kinder, the defendant below and appellee here, was convicted before the justice, but upon an appeal to the circuit court, the affidavit was quashed and he was discharged. The State appeals.

The section of the statute upon which this prosecution is based reads as follows: “Whoever, having the present ability to do so, unlawfully attempts to commit a violent injury on the person of another, is guilty of an assault, and, upon conviction thereof, shall be fined in any sum not exceeding fifty dollars.” R. S. 1881, section 1910.

We have no brief from the appellee, and hence no argument against the sufficiency of the affidavit. Neither have we any information as to the ground on which the affidavit was held to be insufficient. In the absence of any sugges-

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tion to the contrary, we see no objection either to its substantial or technical sufficiency. Moore Crim. Law, section 562.

The judgment is reversed with costs, and the cause is remanded with instructions to overrule the motion to quash the affidavit, and for further proceedings.

Filed Jan. 13, 1887.

No. 12,413.

TABER v. FERGUSON.

CITY.—*Street Improvement.*—*Notice.*—If the common council of a city directs that notices inviting proposals for the improvement of a street shall be published in two newspapers, publication in one is not sufficient.

SAME.—*Transcript.*—*Collection of Assessment.*—*Sufficiency of Notice.*—As the transcript certified by the city clerk is made by law to stand in the nature of a complaint in a proceeding by a contractor to collect an assessment, it is good on demurrer if it shows some notice. If the notice is insufficient the fact must be set up as a defence by way of answer.

SAME.—*Quære*, whether in a proceeding to enforce a street assessment the sufficiency of the notice inviting proposals can be inquired into as a fact. See opinion for cases *pro* and *con*.

SAME.—*Estoppel.*—*Contract.*—A property-owner can not quietly permit money to be expended on work which benefits his land, under a contract with the city, and then deny the power of the city to make the contract.

SAME.—*Estimate.*—The final order of the common council directing an estimate is not affected by a previous order refusing to do so.

SAME.—*Assignment of Estimate.*—*Ratification.*—A ratification by the common council of an assignment of the estimate by the contractor, is equivalent to precedent authority, and entitles the assignee to collect the assessments.

SAME.—*Description of Improvement.*—A resolution of the common council providing for the improvement of a street, is sufficient if it gives a general direction as to the character of the improvement, without describing it in detail.

SAME.—*Plans and Specifications.*—*Evidence.*—The plans and specifications

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109	227
138	139
138	406
109	227
149	120
149	509
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109	227
171	265
171	266

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prepared by the city engineer are competent evidence in a suit to collect a street assessment.

From the Allen Superior Court.

T. E. Ellison, for appellant.

S. E. Sinclair and *H. C. Hanna*, for appellee.

ELLIOTT, C. J.—The validity of a street assessment ordered by the city of Fort Wayne is in question here. The resolution on which the proceedings are based is set forth in the opinion in the case of *Taber v. Grafmiller*, ante, p. 206, and some of the questions here presented were decided in that case.

The objection is made that the notice for proposals is insufficient, and that for this reason the proceedings must fail. The resolution directed the engineer to advertise in two newspapers, the Daily Sentinel and the Tri-Weekly Staats Zeitung, and the transcript shows that the advertisement was published in the Daily Sentinel, but does not affirmatively show that it was published in the Staats Zeitung. The statute does not prescribe what notice inviting proposals shall be given, but provides that the contract shall be given to the best bidder, after advertising for proposals. R. S. 1881, section 3162.

The contention of counsel that the notice must be such as the common council directs is supported by the case of *Kretsch v. Helm*, 45 Ind. 438, and although if the question were an open one, we might feel inclined to hold, in view of the statutory provisions, that a publication in one of two designated newspapers would be sufficient, still we feel bound by that decision on the precise point decided. We can not perceive how the failure to give a notice in two newspapers, when a fair construction of the statute would seem to make notice in one sufficient, can be held to vitiate the proceedings. We suppose that if the common council does all that the law requires, the proceedings should not be nugatory because it failed to do something that it had itself superadded. The

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decision in *Kretsch v. Helm, supra*, can not, however, be decisive of the question here, for there the fact that the notice provided for by the ordinance was not given, was pleaded as a matter of defence, while here the question is presented by a demurrer to the transcript, which, by force of the statute, stands, in a limited sense, as a complaint. R. S. 1881, section 3165.

The provision of the statute is, that the clerk shall make out "a true and complete copy of all papers connected in any way with the said street improvement, beginning with the order of the council directing the work to be done and contracted for, and including all notices, precepts, orders of council, bonds, and other papers filed in said matter; which transcript shall be in the nature of a complaint, and to which the appellant shall answer upon rule."

It seems clear from this provision, that the transcript is not a complaint, but is in the nature of a complaint; and, certainly, it can not, in strictness, be a complaint, for the clerk is only required to certify such papers as are filed. It must be presumed that only such papers are filed as the law requires, and that the transcript need contain no others.

In the record there is a statement that notice was given, and we are of the opinion that it was incumbent upon the appellant to answer as matter of defence, that the notice was insufficient or defective. Any other rule would work great hardship to the contractor, for he can not himself amend the transcript by supplying defects, and, as there is nothing in the statute requiring the filing of notices or proofs, the clerk is not bound to certify them, and hence it can not be inferred that because they are not in the transcript they were not given as the resolution directed. If the transcript contains such papers as, under the law, must come into the hands of the clerk, it should be regarded as *prima facie* sufficient. The transcript ought not to be considered as a complaint, in the just sense of the term, for the real party in interest, the contractor, does not frame it; on the contrary, it is the record

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of a public officer of papers filed in his office. He is only required to certify to such papers as are filed, and, therefore, we do not think that the failure to set forth proof of notice in the transcript renders it bad on demurrer. We think that where the transcript affirmatively shows that some notice was given, the property-owner is put to his defence, although no proof of notice is set forth in the transcript. We have not been able to find any provision of the statute requiring proof of notice of publication to be filed, and as there is no such provision, it can not be held that the transcript must show the filing of the proof. It should not be condemned because a notice not required by law to be embodied in it is not there. We do not, of course, decide that an assessment is good without notice; but what we decide is that the proof of notice need not be embodied in the transcript, and if the notice was insufficient, it should be set up by way of defence, as it was in *Kretsch v. Helm*, *supra*.

If any papers which form part of the proceedings of the council, or which were to be filed with them or with the clerk, were omitted from the transcript, then, doubtless, it should be held that the transcript is not good as a complaint; but the non-appearance of papers or proof not required to be filed with the common council or the clerk, and not forming part of the proceedings, should not condemn it.

There are notices which must of necessity be filed with the clerk or incorporated in the records of the common council, as for instance, notice of the precept, of the sale and the like, and it is to such notices that reference is made by the clause of the statute we have quoted.

It is a just and reasonable presumption that the common council having declared the notice sufficient, it was, at least, *prima facie* good, for they are public officers acting under oath. It does not require a formal order or declaration to establish the council's opinion upon the sufficiency of the notice. This is sufficiently evidenced by acting upon the notice without any formal order. *Updegraff v. Palmer*, 107 Ind.

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181. The fact that the record discloses some notice, and the fact that the judgment of the common council shows that it was deemed sufficient, are enough to put the property-owner to his defence by way of answer.

There is another view which strengthens our conclusion that where it appears that there was some notice the property-owner must answer that it was insufficient, and that view is this: A contractor has a right, in a proper case, although the proceedings are irregular, to avail himself of an estoppel, and if we should hold that the property-owner is not required to answer the insufficiency of the notice where there is some notice, it would result in depriving the contractor of this right, for, as the transcript constitutes the only complaint which can be filed, and as the law directs what it shall contain, the contractor can not inject into it any other matters. That an estoppel may be made available in a proceeding to recover a street assessment is well established by the authorities. The rule is thus stated in a late work: "Thus, a property-holder can not quietly permit money to be expended in work which benefits his land, under a contract with the city, and then deny the power of the city to make the contract." 2 Herman Estoppel and Res Judicata, section 1221. This principle has been fully recognized and strongly asserted by this court. *Hellenkamp v. City of Lafayette*, 30 Ind. 192; *City of Evansville v. Pfisterer*, 34 Ind. 36 (7 Am. R. 214); *City of Lafayette v. Fowler*, 34 Ind. 140; *City of Logansport v. Uhl*, 99 Ind. 531 (50 Am. R. 109), see p. 541.

The cases elsewhere sustain this doctrine, as will appear from an examination of the authorities referred to by the author from whom we have quoted. The principle has been given effect in tax and drainage cases. *Peters v. Griffie*, 108 Ind. 121; *Flora v. Cline*, 89 Ind. 208; *Muncey v. Joest*, 74 Ind. 410, see pp. 413, 414; *Nevins, etc., Co. v. Alkire*, 36 Ind. 189; *Ricketts v. Spraker*, 77 Ind. 371, see pp. 381, 382.

If it be true, as it certainly is, that a contractor may avail

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himself of an estoppel, then it must be true that some opportunity must be given him to plead it, and this opportunity he could not have if it were held that such a transcript as the one before us is fatally bad on demurrer, since that would shut out any estoppel. The fair and reasonable procedure in such cases as this, where the transcript certified by a public officer is made by law to stand in the nature of a complaint, and there is some notice affirmatively shown, is to require the property-owner to answer, and permit the contractor to reply.

Under the rule as declared in *Martindale v. Palmer*, 52 Ind. 411, the question as to the sufficiency of the notice can not be made available, for it was there said, in speaking of the insufficiency of a notice inviting proposals, that "This can not be inquired into as a fact, as the statute expressly provides, 'that no question of fact shall be tried which may arise prior to the making of the contract for the said improvement under the order of the council.' Section 71, 3 Ind. Stat. 102; *The City of Indianapolis v. Imberry*, 17 Ind. 175."

The case cited by the court undoubtedly sustains this doctrine, and so do the cases of *Palmer v. Stumph*, 29 Ind. 329, *Board, etc., v. Silvers*, 22 Ind. 491, and *McGill v. Bruner*, 65 Ind. 421.

These cases can not, however, be easily reconciled with the cases of *Kretsch v. Helm*, *supra*, *McEwen v. Gilker*, 38 Ind. 233, *Moberry v. City of Jeffersonville*, 38 Ind. 198, or *Brookbank v. City of Jeffersonville*, 41 Ind. 406.

We do not deem it necessary to undertake to determine which line of decisions is the better one, for we think the question may be decided without entering the field of conflict. In view, however, of the strong and clear language of the statute, and of the conflict in the authorities, we deem it proper not to extend the rule adopted in *McEwen v. Gilker*, *supra*, to such a case as this, nor do we feel inclined to give it, directly or indirectly, our approval, but we leave the ques-

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tion open for further consideration, since it is now left undecided by the conflict in the cases.

It appears in the transcript that the common council at one time refused to order an estimate, but that after some litigation, the character of which is not disclosed, an estimate was ordered. We think it clear that the final action of the common council is the governing one, for we do not believe that intermediate orders can overturn the final order. This is substantially held in the case of *McGill v. Bruner, supra*.

The record shows that the contract was made with Christian Grafmiller, and that he executed to John Ferguson the following assignment: "For value received, I hereby assign and transfer the within estimate to John Ferguson, July 28th, 1884. Christian Grafmiller."

The only objection to the assignment that is important enough to merit especial consideration, is, that it does not appear that the common council consented to the assignment by Grafmiller. We think that the acceptance by the common council of Ferguson's affidavit as the assignee of Grafmiller, and the action taken thereon, were a ratification of the assignment, and, as is well known, a subsequent ratification is equivalent to precedent authority. We do not perceive how the property-owner could have been prejudiced by the assignment of the estimate, for that was little else than an evidence of a debt, and a step in the process of collecting it, so that the question is very different from what it would be had there been an assignment of the contract. The difference between an assignment of the contract made before the work was done, and an assignment of the estimate issued after the work was performed, is so obvious as not to require illustration. But we do not deem it proper to do more than decide that the subsequent ratification of the assignment of the estimate was equivalent to a precedent authority, so that there is no question as to the right of the appellee to collect the assessment.

It was proper to file the assignment with the city clerk, and

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when filed, it became part of the papers connected with the proceedings which it was his duty to embody in the transcript. It is, therefore, properly in the record certified to the circuit court.

We held in *Taber v. Grafmiller*, *supra*, that the resolution was sufficient, inasmuch as it gave a general direction as to the character of the improvement, and that holding is sustained by the cases cited, as well as by the case of *Martindale v. Palmer*, *supra*. The language of the ordinance in that case was that the street "be properly graded according to stakes set by the chief engineer, and that the same be paved with the Nicholson or wooden block pavement," and the court held, that it was sufficient, saying: "That which can be made certain is certain." In *Burr v. Town of Newcastle*, 49 Ind. 322, it was held, that an ordinance establishing the grade of the streets of the town was not invalid if the grades could be ascertained without difficulty. We think this principle applies here, for no one can be in doubt as to the character of the pavement proposed to be laid.

It is objected that the plans and specifications prepared by the engineer were not competent. We think otherwise. They were prepared before the notice inviting proposals was given, and showed in detail the character of the work which the city desired done. The statute expressly makes it the duty of the engineer to prepare plans and specifications, and certainly plans and specifications prepared by an officer expressly authorized by law to prepare them must be competent evidence.

It was not necessary to prove the execution of the assignment, for it was certified by the clerk as part of the papers filed in the proceedings. If the appellant desired to dispute the validity of the assignment, a proper plea should have been filed.

The record does not show that it contains all the instructions given by the court, and it can not be said that it affirmatively appears that any error was committed in refusing

The Cincinnati, Indianapolis, St. Louis and Chicago Railway Co. v. Parker.

instructions asked by the appellant. For aught that appears, instructions fully covering those refused were given by the court. *Kennedy v. Anderson*, 98 Ind. 151; *Newcomer v. Hutchings*, 96 Ind. 119; *Mitchell v. Tomlinson*, 91 Ind. 167; *Pittsburgh, etc., R. R. Co. v. Noel*, 77 Ind. 110.

Judgment affirmed.

Filed Jan. 11, 1887.

No. 12,448.

THE CINCINNATI, INDIANAPOLIS, ST. LOUIS AND CHICAGO
RAILWAY COMPANY v. PARKER.

RAILROAD.—*Action for Stock Killed.*—*Fence.*—*Burden of Proof.*—When it is shown, in an action by the owner against a railroad company to recover the value of a horse, that at the point where the animal went upon the track and was killed, the road was not securely fenced, the burden is then upon the defendant to show, in order to escape liability, that at that point it was not bound to maintain fences.

SAME.—*Venue.*—*Justice of Peace.*—Such an action may be brought before any justice of the peace in the county where the animal is killed.

From the Boone Circuit Court.

F. M. Charlton, R. W. Harrison and C. S. Wesner, for appellant.

ZOLLARS, J.—Appellee brought this action to recover the value of a horse, which, it is alleged, went upon appellant's railway at a point where it was not, but ought to have been, securely fenced, and was there killed by one of appellant's trains.

The errors assigned are, that the complaint does not state facts sufficient to constitute a cause of action, and that the court below erred in overruling appellant's motion for a new trial.

It is contended that a new trial should have been granted,

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because the evidence does not show that at the point where the horse went upon the track the road should have been fenced so as to exclude animals.

When it was shown by the evidence in behalf of appellee, that at the point where the horse went upon the track and was killed, the road was not securely fenced, the burden was upon the railway company to show, in order to escape liability, that at that point it was not bound to maintain fences. That it did not attempt to do. *Evansville, etc., R. R. Co. v. Mosier*, 101 Ind. 597.

It is further insisted, that as the action was commenced before a justice of the peace, the complaint is defective, because it does not show that the horse was killed in the township where the action was brought. That objection is not well taken. Such an action may be brought before any justice of the peace in the county where the animal is killed. *R. S.* 1881, section 4026; *Wabash, etc., R. W. Co. v. Lash*, 103 Ind. 80.

Judgment affirmed, with costs.

Filed Jan. 12, 1887.

No. 12,745.

KENNEDY v. THE STATE, FOR USE OF DORSETT, DRAINAGE
COMMISSIONER.

DRAINAGE.—Complaint to Collect Assessment.—Must Show Notice of Filing Petition for Drain.—A complaint to collect a drainage assessment is bad on demurrer unless it shows, either by averment or by exhibits properly constituting a part of it, that some notice was given of the filing of the petition for the establishment of the drain.

From the Morgan Circuit Court.

J. H. Jordan and *O. Matthews*, for appellant.

G. W. Grubbs and *M. H. Parks*, for appellee.

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Howk, J.—The first error assigned by appellant, the defendant below, upon the record of this cause, is the overruling of his demurrer to the second paragraph of appellee's complaint.

The second paragraph, as it is called, is the only complaint in the record of this cause, and, for the sake of brevity, it will be spoken of as the complaint in this opinion. In his complaint, appellee's relator alleged that he was one of the drainage commissioners of Morgan county; that, on the 24th day of April, 1883, Joshua Wooden, a resident freeholder of Morgan county, filed his petition in the court below, praying for the construction of a ditch or drain extending into the townships of Adams and Gregg, in such county, describing therein the beginning, course and terminus, the utility and purpose of the same, and the lands to be affected, with the names of the owners, whose lands would be benefited by the construction of such ditch; that such proceedings were then and there had, that the court having found such petition to be sufficient ordered that it be referred to the drainage commissioners of such county, to wit, William H. Miller and Solomon Dorsett, the relator herein; that said commissioners, after inspecting the beginning, course and terminus, and all the lands that would be affected by the proposed ditch, as provided by law, and having assessed the benefits and damages to all lands affected, on the 28th day of September, 1883, filed their report in open court, a copy of which report with such assessments therein was filed with and made part of the complaint. Here a certified transcript of the proceedings of the court below, on September 28th, 1883, on the petition of said Joshua Wooden, is set out in the body of the relator's complaint herein, containing, among other things, the report of the drainage commissioners with their assessments of benefits and damages, and the judgment of the court establishing the proposed ditch, and approving and confirming the assessments made by said commissioners, and directing the relator, Solomon Dorsett, one of such com-

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missioners, to construct and make the proposed ditch. It is shown by this transcript, that certain described real estate was assessed with benefits, in the name of appellant, Kennedy, to the aggregate amount of eighty dollars.

It was further alleged by the relator, that among the lands set out in Wooden's petition, and in such report of the drainage commissioners, as benefited by the construction of the proposed ditch, were the following lands owned and occupied by appellant, Kennedy, in Morgan county, to wit: (description omitted); that the benefits assessed by said commissioners against such lands, and made part of their report and approved by the court, amounted to the sum of eighty dollars; that under and pursuant to the order of the court, the relator had proceeded with the construction of such ditch, and then had the same about completed in accordance with such order; that relator had made assessments against the lands embraced in such order, including those of appellant, ratably upon the amounts assessed by the drainage commissioners, and adjudged by the court, for the construction of such ditch, and that he gave notice of such assessments by publication thereof in the "Martinsville Republican," a paper of general circulation in Morgan county, and by personal notice to the appellant; that the whole of the benefits assessed against all of said lands, and against appellant's lands, were found to be necessary for the construction and completion of the proposed ditch; that he made an assessment of the entirety of said sum of eighty dollars against the appellant, and gave him notice of the time and place, when and where the several instalments were required to be paid; but that appellant had wholly failed and refused to pay said assessment, or any part thereof, and that such sum was due and wholly unpaid. A copy of such assessment and of the notice thereof was set out in such complaint, as a part thereof. Wherefore, etc.

Appellant's demurrer to the foregoing complaint, for the want of sufficient facts therein to constitute a cause of action,

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was overruled by the court, and this ruling is assigned here as error.

Many objections to the sufficiency of the relator's complaint are urged here, in argument, by appellant's learned counsel. One of these objections, at least, it must be held, in conformity with our previous decisions, is well taken, and must be sustained. That objection is, that the relator nowhere alleged in his complaint, nor did he show by any exhibit set out therein, or made part thereof, that any notice of any kind was given by the petitioner, Joshua Wooden, of his intention to file his petition for the establishment and construction of the ditch, mentioned in such complaint.

In section 3 of the drainage act of April 8th, 1881 (section 4275, R. S. 1881), as such section was amended by section 2 of the amendatory act of March 8th, 1883 (Acts of 1883, p. 174), which amended section was in force from and after its passage, and at and before the time of the filing of Joshua Wooden's petition in the court below, it was provided as follows: "Whenever the petitioner shall file his petition in the clerk's office of the circuit court, he shall fix and note thereon the day set for docketing thereof, and if it appear to the court that notice has been given of the filing of said petition by posting up notices thereof in three public places in each township where the lands are situated, described in said petition, and near the line of the proposed work, and at the court-house door in each of the counties in which said lands are situated, not less than twenty days before the day noted thereon, and set as the day for the docketing the same, the court shall order the same placed on the dockets of said court as an action pending therein."

In construing these statutory provisions, it has been held by this court that the notice called for therein is jurisdictional, and that even in a suit, such as the one under consideration, for the collection of an assessment of benefits and the enforcement by foreclosure of the statutory lien on the lands benefited, it must be shown in the complaint in some

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manner, either by positive averment or by exhibits properly constituting a part thereof, that some notice of the kind was in fact given.

The pending suit, under our decisions, is, in some sense, collateral to the proceedings and judgment on the original petition of Joshua Wooden for the establishment and construction of the ditch. Yet it has been held in many of our cases, such as this, for the collection of an assessment of benefits and the enforcement of the statutory lien thereof, notwithstanding the presumptions that are ordinarily indulged by this court in favor of the jurisdiction of our circuit courts as courts of general jurisdiction, that the relator must show in his complaint by positive averment, or by proper exhibit therewith filed, that some notice was given of the filing of the petition for the establishment and construction of the ditch. Thus, in the recent case of *Pickering v. State, etc.*, 106 Ind. 228, which was a suit for the collection of an assessment of benefits, the court said: "We think our cases establish the rule that it must appear either in the body of the complaint, or in the exhibit properly a part of that pleading, that there was some notice, and this is the general current of authority."

In our earlier drainage cases, where suits had been brought for the collection of assessments of benefits and the enforcement of the statutory lien thereof, it was held, substantially, that the complaint of the plaintiff must state facts, showing that the provisions of the statute had been essentially complied with, from the commencement of the original proceedings for the establishment and construction of the ditch, to the last act necessary to be performed therein. *Shaw v. State, etc.*, 97 Ind. 23; *Wishmier v. State, etc.*, 97 Ind. 160. The rule of pleading declared in the cases cited has since been materially modified.

In *Laverty v. State, ex rel., ante*, p. 217, the court said: "In suits for the collection of drainage assessments, such as the case under consideration, all that the complaint of the

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plaintiff's relator need state or show, of or concerning the original proceedings and judgment for the establishment of the ditch, are (1) that some notice was given of the filing of the petition for the ditch, (2) the filing of such petition, (3) the report of the commissioners of drainage of the benefits and damages assessed, and (4) that such report was approved and confirmed by the judgment of the court, and (5) a copy of the assessment against the defendant, in all cases, must be either set out in, or filed with and made part of, such complaint." Upon the same subject, see, also, the following cases: *Moss v. State, ex rel.*, 101 Ind. 321; *Jackson v. State, etc.*, 103 Ind. 250; *McMullen v. State, ex rel.*, 105 Ind. 334.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the demurrer to the second paragraph of complaint, etc.

Filed Jan. 12, 1887.

No. 12,881.

LAFOLLETTE v. HIGGINS.

109 241
152 555

SUPREME COURT.—Appeal.—Motion for New Trial.—Where the record shows that a motion for a new trial was made and overruled in the lower court, but the record does not disclose that any written causes for a new trial were filed, it will be presumed that no motion, accompanied by specified causes, as required by the statute, was presented to the court below.

SAME.—Motion for New Trial.—Assignment of Errors.—Objections to the finding of the lower court, or to its rulings on the admissibility of testimony, are available only by a motion for a new trial, and can not be presented for the first time by assignment of error in this court.

From the Boone Circuit Court.

C. S. Wesner and *H. M. LaFollette*, for appellant.

R. W. Harrison and *B. S. Higgins*, for appellee.

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LaFollette v. Higgins.

MITCHELL, J.—Grant A. LaFollette filed a complaint against John Higgins, in which he charged that the latter, as guardian of the minor heirs of Harvey M. LaFollette, deceased, of whom the complainant was one, had failed, in various specified particulars, to faithfully execute his trust. He asked that the final settlement report theretofore made by the defendant be set aside.

Issue was taken by a general denial; trial by the court; finding and judgment for the defendant below.

A record entry recites that the plaintiff moved the court for a new trial, and that the motion was overruled.

After careful examination of the record, we have failed to discover that any written causes for a new trial were filed. We conclude, therefore, that no motion, accompanied by specified causes, as required by the code, was presented to the court below.

The only errors assigned upon the record here are the following :

“1. The court erred in overruling appellant’s motion for a new trial.

“2. The court erred in finding for the appellee upon the evidence given in the cause.

“3. The court erred in sustaining the objection of the appellee to appellant’s offer to prove the rate of interest per annum at which money could have been loaned during the years 1868 to 1875, inclusive.

“4. The court erred in overruling appellee’s objection to oral testimony being given to prove contents of record.”

The application for a new trial, it is scarcely necessary to say, must be by motion, upon written cause filed at the time of making the motion. Section 562, R. S. 1881; *Secor v. Souder*, 95 Ind. 95; *Harris v. Boone*, 69 Ind. 300.

Since, as we have seen, the record fails to disclose a motion for a new trial, upon causes assigned, as the statute prescribes, the first assignment of error above set out presents no ques-

The State, *ex rel.* Minor, *v.* Newcomer *et al.*

tion for consideration. *Shover v. Jones*, 32 Ind. 141; *Krutz v. Craig*, 53 Ind. 561.

The second, third and fourth assignments are, for the reason already given, wholly ineffectual to present any question. If the matters assigned as error had been properly specified as written causes for a new trial, and filed in the court below, with a motion for that purpose, the overruling of such motion, if assigned as error here, would have required an examination of the questions elaborately argued by counsel.

As we find it, the record presents for decision none of the questions discussed. *Kissell v. Anderson*, 73 Ind. 485.

It is not claimed that the provisions of the civil code, in respect to motions for a new trial, are not applicable to proceedings such as this.

In the absence of any question, we must presume in favor of the rulings at the hearing below, and, indulging this presumption, the judgment is affirmed, with costs.

Filed Jan. 12, 1887.

No. 12,683.

THE STATE, EX REL. MINOR, *v.* NEWCOMER ET AL.

SHERIFF.—*Escape of Prisoner.*—*Action for.*—*Recapture.*—*Measure of Damages.*—*Bastardy.*—Where, during the pendency of an action against a sheriff, by the relatrix in a bastardy proceeding, for permitting the defendant in that proceeding to escape, the fugitive is re-arrested, although more than three months after his escape, and held in custody under a judgment recovered against him in his absence by the relatrix, the sheriff is liable only for actual damages. *State, ex rel., v. Hamilton*, 33 Ind. 502, and cases following it, distinguished.

From the Hamilton Circuit Court.

R. R. Stephenson and *W. R. Fertig*, for appellant.

T. J. Kane and *T. P. Davis*, for appellees.

The State, ex rel. Minor, v. Newcomer et al.

Howk, C. J.—This was a suit by appellant's relator, Alice Minor, upon the official bond of appellee Newcomer, as sheriff of Hamilton county, against him and his sureties therein. The breach of the bond assigned was, that Newcomer, as such sheriff, wrongfully, unlawfully and voluntarily suffered one Wilie Lucas, who was lawfully in his custody, at the suit of the relatrix, upon the charge of bastardy, to escape from his custody in the county jail. The cause was put at issue and tried by the court; and at the request of the relatrix, the court made a special finding of the facts, and thereon stated its conclusions of law, in her favor. Over her exceptions to the conclusions of law, the court rendered judgment in accordance therewith.

The only error assigned here, by appellant's relatrix, is that upon the facts specially found the court had erred in its conclusions of law.

The court found the facts of the case to be substantially as follows:

The defendant Newcomer was the sheriff of Hamilton county for the term of two years, beginning on the 18th day of November, 1882, and on that day qualified and gave bond with his co-defendants as his sureties therein; a correct copy of which bond was filed with the complaint herein.

On the 27th day of August, 1884, on the complaint of the relatrix herein before a justice of the peace of Hamilton county, one Wilie Lucas was, by such justice, adjudged to be the father of a bastard child, of which relatrix had then been delivered, and, being in custody, was required by such justice to give bond in the sum of \$1,000, conditioned for his appearance at the next ensuing term of the Hamilton Circuit Court to answer such charge of bastardy. Lucas failing to give such bond was, by such justice, committed to the county jail of such county and was there received by the defendant Newcomer, as such sheriff, under the order of commitment, and confined in such jail by authority thereof, and not otherwise, until the 1st day of September, 1884, when such sheriff,

The State, *ex rel.* Minor, v. Newcomer *et al.*

without the knowledge or consent of the relatrix, took said Lucas out of such jail and put him in charge of a bailiff to visit the house of the relatrix to try to negotiate a compromise with her,—her residence being — miles from the jail. After visiting the home of relatrix and failing to agree on a compromise, said Lucas went to the town of Sheridan, in such county, in company with such bailiff, and was allowed by the bailiff to alight from the buggy wherein they were travelling, and go into a house alone after some clothes, while the bailiff remained in the buggy in the street. Lucas never returned to such bailiff, but made his escape through the back part of the house, and the bailiff returned to the jail without him; and Lucas remained at large until said cause was tried in the circuit court, and judgment was rendered against him, as hereinafter found. On the day last named, the defendant Newcomer, as such sheriff, suffered the escape of Willie Lucas from such jail, and such escape was voluntary on the part of such sheriff.

Such justice without delay transmitted to the Hamilton Circuit Court a transcript of such bastardy proceedings, and all the papers therein, and said cause was docketed for trial in such court. At the February term, 1885, of such court, the escape of Lucas was suggested and noted on the record, and he was called and defaulted, and the cause was tried by the court in his absence; and he was found to be the father of such bastard child, and judgment was rendered against him for the maintenance thereof, in the sum of \$600, payable to the relatrix in instalments, as follows: \$100 in thirty days thereafter, and \$100 on the 10th day of February, in each year for five years next thereafter, which judgment remained wholly unpaid, and without replevin bail for stay of execution thereon. As part of such judgment, Lucas was required to replevy the same by good freehold bail, and, in default thereof, it was ordered that he be committed to jail. Afterwards, on the 1st day of May, 1885, the defendants procured the re-arrest of Lucas by the succeeding sheriff of such

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county, by whom he was placed in the common jail of the county, where he had been since, and then was, held in custody under the *mittimus*, judgment and proceedings in said cause, and not otherwise. At the commencement of such bastardy proceedings, Wilie Lucas was and had been since, and still was, openly and notoriously insolvent, and had no money or property and had none then, and at no time had any friends who were able or willing to assist him in replevying or paying such judgment.

This action was commenced on the 17th day of April, 1885, at which time Wilie Lucas was at large and his whereabouts were wholly unknown, and he remained at large and in parts unknown until May 1st, 1885. At the time of commencing this action, the relatrix employed counsel, whose services in the preparation and prosecution of this cause, up to the time of such re-arrest, were of the value of \$25, and she had incurred other costs and expenses in the sum of \$10, for clerk's and sheriff's fees in this action. At all times, while Lucas was at large, defendant Newcomer was making diligent efforts to ascertain the whereabouts, and effect the recapture, of said Lucas, and had other parties employed to assist him in such search. Newcomer was acting in good faith, in allowing Lucas to leave the jail in charge of a bailiff, in the honest belief that Lucas was going to visit the relatrix with the honest purpose of effecting a compromise, and did not thereby intend in fact to allow or permit said Lucas to escape. Relatrix has not been damaged or injured, in any respect whatever, by reason of the said escape of said Lucas, *except* in the matter of attorneys' fees and costs accrued in the commencement and prosecution of this case prior to May 1st, 1885.

As conclusions of law upon the foregoing facts, the court found (1) the measure of the relatrix's damages, upon the bond in suit, to be the \$25 attorneys' fees and \$10 costs, above mentioned, and (2) in consequence of the insolvency of Lu-

The State, *ex rel.* Minor, v. Newcomer *et al.*

cas, and his subsequent re-arrest, the relatrix sustained no damages on account of her said judgment.

Upon the facts found by the court, did it err in its conclusions of law? Conceding that the escape of Willie Lucas from jail and from the custody of the sheriff was voluntary on the part of such sheriff, can it be correctly said, in view of all the facts found by the trial court, that he and his sureties, by reason of such escape, became liable to the relatrix upon his official bond for the full amount of her judgment against the said Lucas? The trial court found as a fact, and as a conclusion of fact from a number of other facts which were also fully found, that the relatrix had not been damaged or injured, in any respect whatever, by reason of the escape of Willie Lucas, except as to her attorneys' fees and costs in this suit, prior to the re-arrest of Lucas on May 1st, 1885, for which fees and costs the relatrix recovered judgment. Substantially in accordance with this fact and conclusion of fact, and almost in the same language, as we have heretofore shown, the trial court stated its conclusions of law.

In section 6124, R. S. 1881, in force since May 6th, 1853, it is provided that if any prisoner, confined on civil process, shall violently escape from prison, without the connivance of the jailer, and such prisoner shall be recommitted to the prison whence he escaped, within three months next after such escape, such recommitment shall operate to bar any recovery against the sheriff for such escape, except for the costs of any action that shall have been previously commenced against him therefor.

It is clear that the case under consideration is not within the letter of these statutory provisions, for the re-arrest and recommitment of Lucas, as found by the court, was not within three months, nor until eight months, next after his escape; and it can hardly be said, with any degree of accuracy, that Lucas had violently escaped from prison or from the custody of the sheriff.

In *State, ex rel., v. Hamilton*, 33 Ind. 502, it was held that

Redpath *et al.* v. Tutewiler *et al.*

the statutes of West. 2, ch. 11 (13 Ed. 1), and 1 Rich. 2, ch. 12, are in force in this State; and, under these statutes, it was also held that if a sheriff permits a debtor to escape, who is charged in execution for a certain sum, he thereby becomes liable upon his official bond to the execution creditor for the entire debt, notwithstanding the insolvency of the escaped debtor. Upon these points, the case cited has been fully approved and followed in our more recent decisions. *State, ex rel., v. Mullen*, 50 Ind. 598; *Lakin v. State, ex rel.*, 89 Ind. 68; *Rooksby v. State, ex rel.*, 92 Ind. 71.

But, in the case in hand, a fact was found by the trial court which did not appear in any of our previous cases, and which, as we regard it, must exercise here, as manifestly it did below, a controlling influence in the decision of this cause. The fact referred to is the re-arrest and recommitment of Lucas to the county jail, prior to the trial herein, to be there held in custody until the judgment of the relatrix against him was paid or replevied, as required by law and the terms of such judgment.

Upon the facts found, we are of opinion that the trial court did not err in its conclusions of law. *Lucas v. Hawkins*, 102 Ind. 64.

The judgment is affirmed, with costs.

Filed Nov. 5, 1886; petition for a rehearing overruled Jan. 14, 1887.

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127	508

No. 13,258.

REDPATH ET AL. v. TUTEWILER ET AL.

VOLUNTARY ASSIGNMENT.—Deed.—Preference of Creditors.—Fraud.—In the absence of actual fraud, a deed of assignment, under the statute, for the benefit of creditors, will be upheld as a valid general assignment notwithstanding a provision that certain creditors shall be preferred, as such provision will be controlled and annulled by the statute.

From the Marion Circuit Court.

Redpath *et al.* v. Tutewiler *et al.*

N. Morris, L. Newberger, W. W. Herod, J. E. Florea and A. W. Wishard, for appellants.

R. Hill and R. N. Lamb, for appellees.

MITCHELL, J.—This action was brought by the plaintiffs below to set aside a deed of assignment, by which Henry Tutewiler transferred all his property, real and personal, to William G. Cook, as assignee, for the benefit of the assignor's creditors.

The complaint alleges, that after the assignment was made the plaintiffs recovered a judgment against the assignor in the superior court of Marion county for \$306, which remains unpaid. The complaint avers, and the deed, a copy of which is set out in the complaint, shows, that the assignment was intended to be made in conformity with the statute regulating voluntary assignments for the benefit of creditors.

The instrument is assailed solely upon the ground that it provides for a preference of two of the assignor's creditors therein named. In all other respects it is conceded that the deed was made, and that the estate assigned is being administered, conformably to the assignment law.

In the recent case of *Henderson v. Pierce*, 108 Ind. 462, upon consideration of the exact question here involved, it was held, that where no actual fraud was averred or proved, an instrument of assignment, made by a debtor in failing circumstances, with the apparent purpose to avail himself of the benefit of the law regulating voluntary assignments, would not be condemned as void in toto, because the assignor provided therein for preferences to certain of his creditors.

In such a case, the provision in the deed, that some of the assignor's creditors should be preferred in the distribution of the estate, will be controlled and annulled by force of the statute.

The estate, having been brought under the jurisdiction and control of the court, by means of the assignment, will be ad-

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ministered and distributed as the law directs, without regard to such provision.

It is only where the deed of assignment contains directions which are actually hostile to, and in disregard of, some express provision of the assignment law, or where it is apparent therefrom that it was not the intent of the assignor to bring his estate under the control of the court, and secure its distribution according to the law regulating voluntary assignments, that the deed will be held fraudulent and void *per se* under section 2662, R. S. 1881.

There was no error in the rulings of the court.

The judgment is affirmed, with costs.

Filed Jan. 14, 1887.

100	250
131	196
109	250
138	130
109	250
141	545
109	250
150	102

No. 12,666.

WYNN v. TROY ET AL.

SPECIAL FINDING.—*Exception to Conclusion of Law.*—*Admission as to Facts.*—

Where the exception is only to the conclusion of law stated upon a special finding of facts, the facts are admitted to have been fully and correctly found.

SAME.—*Failure to Find Essential Fact.*—If a fact upon which the liability of the defendant depends is not found, an exception to a conclusion of law that the plaintiff is not entitled to a lien upon the defendant's property, presents no question.

From the Hancock Circuit Court.

J. W. Hardman, E. Marsh and W. W. Cook, for appellant.

C. G. Offutt and R. A. Black, for appellees.

Howk, C. J.—After this cause was put at issue, it was tried by the court; and at the request of appellant, the plaintiff below, the court made a special finding of the facts, and thereon stated its conclusions of law. Over appellant's ex-

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ceptions to the court's conclusions of law, judgment was rendered thereon and in accordance therewith. From this judgment, appellant prosecutes this appeal; and the only error of which she here complains, is the alleged error of the trial court in its conclusions of law.

The facts found by the court were substantially as follows: On the 4th day of January, 1883, Harriet Piper purchased of the defendant, Christopher C. Troy, lots numbered 2 and 3, in block "I," in Records and Vorhes' addition to the town of Fortville, in Hancock county, and she sold, assigned and transferred to said Troy a note, calling for the sum of — dollars, purporting to have been executed to her by Gray & Walker. Afterwards, defendant Troy represented to the defendant Harriet Piper, that there was a mistake in said note in the interest clause thereof, and that it did not draw interest as was intended by the parties; and thereupon the said Troy caused to be drawn up a note, of which the following is a copy:

"\$483.33.

March 31st, 1883.

"One hundred and fifty days after date, we promise to pay to the order of Harriet Piper, at Fortville, four hundred and eighty-three $\frac{33}{100}$ dollars, value received, without any relief from valuation or appraisement laws, with eight per cent. per annum from date until paid and attorneys' fees. The drawers and endorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note.

(Signed) GRAY & WALKER."

And the same was thereupon executed by Joseph B. Gray in the name of Gray & Walker, and was by said Troy presented to the defendant, Harriet Piper, for her endorsement, in lieu of the original note. Said note was made by the parties for the purpose of correcting a mistake which was made in the original note, as to the interest that the note should draw, and was accepted by said Troy in payment for the real estate above described. Afterwards, said Troy purchased of the plaintiff, Wynn, certain real estate in Hancock

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county, and, in payment therefor, transferred and endorsed said note to her. All the parties up to that time believed the note to be a valid and binding promissory note of the firm of Gray & Walker. Prior to the giving of the note first above mentioned, and at the time of its execution, Gray & Walker were partners in a firm composed of Joseph B. Gray and Marcellus B. Walker, who were engaged in the mercantile business in said town of Fortville. Prior to the execution of said first note, Gray had borrowed of the defendant Harriet Piper, the sum of \$300 upon his own credit and for his own purposes, and had executed to her his note therefor. During the existence of such firm, Gray also borrowed of the defendant Piper, an amount equal to the residue of such note, upon the credit and, ostensibly, for the purposes of said firm in its business, and thereupon executed to her a note in said firm name for his individual debt aforesaid and said partnership debt. Said note was so executed without the knowledge or consent of Marcellus B. Walker. Prior to the time of the execution of the note in suit in this action, the firm of Gray & Walker was dissolved, and the note in suit was executed by Joseph B. Gray, in the name of Gray & Walker, without the knowledge or consent of said Walker. After the maturity of said note, on the 18th day of December, 1882, plaintiff Wynn brought suit against said Gray & Walker as defendants, in the Hancock Circuit Court, to recover upon such note. Gray made default, and judgment was rendered against him for the amount due on the note. Walker appeared and answered by a denial under oath of his execution of the note; and upon the trial of this issue, a verdict was rendered and judgment was returned, in favor of said Walker, for his costs taxed at \$44.05.

Prior to the trial of said cause, the defendant in this suit, Harriet Piper, knew of Walker's defence to the note, but she did not employ counsel nor take any part in the prosecution of such cause, and only appeared at the trial thereof as a witness for the plaintiff. Troy knew of the pendency

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of such cause, and employed counsel therein, who appeared for him and assisted in the prosecution thereof. At the maturity of the note in suit, Joseph B. Gray was insolvent, and had no property out of which the debt, or any part thereof, could have been made by execution.

Upon the foregoing facts, the court stated the following conclusions of law :

1. "The plaintiff is entitled to recover of the defendants, Harriet Piper and Christopher C. Troy, severally, the amount of the note sued on, with the interest thereon, and the costs of the trial of the issue joined between plaintiff and Marcellus B. Walker, in the action brought thereon against him and Gray, to wit, the sum of \$586.

2. "The plaintiff is not entitled to have such sum declared to be a lien upon the real estate conveyed by Christopher C. Troy to the defendant Harriet Piper, as a vendor's lien or otherwise."

Did the trial court err in its conclusion of law (which we have numbered 2), upon the facts specially found? In other words, did the court err in holding, upon the facts found, that appellant had no lien, either as vendor or otherwise, upon the lots of Harriet Piper? This is the only question we are required to consider and decide; for, we do not understand that appellant complains here of the first conclusion of law, or of the personal judgment rendered thereon, in her favor, against each of the appellees for the full amount due on the note in suit. As the appellant has presented her case here, solely upon her exceptions to the court's conclusions of law, it is settled by our decisions that she thereby admits that the facts of the case have been fully and correctly found, and can only claim that the trial court has erred in applying the law to the facts so found. *Cruzan v. Smith*, 41 Ind. 288; *Robinson v. Snyder*, 74 Ind. 110; *Bass v. Elliott*, 105 Ind. 517.

Upon the facts found by the court, we are of opinion that the appellant has no possible ground or reason for complain-

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ing of either of the conclusions of law. The fundamental fact alleged by appellant, in stating her supposed cause of action against the appellee Harriet Piper, was that the latter had assigned the note in suit, by endorsement, to her co-appellee Troy. In the absence of an averment of this fundamental fact, it is certain, we think, that appellant's complaint would not have stated any cause of action against the appellee Harriet Piper. Yet, in its special finding of facts, the court wholly failed to find as a fact, perhaps through an oversight, and perhaps for the want of any evidence, that appellee Harriet Piper had ever assigned, by endorsement, the note in suit to her co-appellee, Christopher C. Troy. The evidence is not in the record, and we do not know why the court failed to find this fundamental fact, if it were the fact.

In this state of the record, it seems to us that Harriet Piper alone has cause to complain of the court's conclusions of law, and, surely, appellant ought not to complain, for, upon the facts found by the court, the conclusions of law were more favorable to her than she was authorized to ask or expect.

The judgment is affirmed, with costs.

Filed Oct. 29, 1886; petition for a rehearing overruled Jan. 14, 1887.

No. 12,721.

STIX ET AL. v. SADLER ET AL.

VOLUNTARY ASSIGNMENT.—Sale of Mortgaged Property.—Enforcement of Mortgage Against Proceeds.—Section 2674, R. S. 1881, concerning voluntary assignments, is not applicable to a complaint by a mortgagee seeking to enforce his mortgage against the proceeds of a sale of the mortgaged property.

SAME.—Sale by Assignee.—Payment of Lien.—Contract.—The creditors of a debtor who has made an assignment for the benefit of his creditors can

100	254
126	57
127	270
127	510
100	254
126	134
100	254
120	482
100	254
121	325
123	555
100	254
124	61
100	254
120	609
100	254
142	496
143	57
143	555
100	254
144	607
145	608
147	324
147	323
100	254
154	89
100	254
160	695

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not, to the injury of the mortgagee, repudiate a contract made by the assignee with the holder of a chattel mortgage to sell the mortgaged property and apply the proceeds to the payment of the lien.

SAME.—Preference of Creditor.—Chattel Mortgage.—A debtor may in good faith prefer a creditor, and a chattel mortgage executed five days prior to a deed of assignment will be upheld in the absence of a showing of fraud.

TRIAL.—By Court.—Suit to Set Aside a Mortgage.—A suit to set aside a mortgage is of equitable cognizance, and triable by the court.

SPECIAL FINDING.—Facts Not Found.—Presumption.—Facts not stated in a special finding are presumed, as against the party having the burden of proof, not to exist.

SAME.—Fraud.—Chattel Mortgage.—Fraud is a question of fact, and must be found as such. It is not enough to justify a judgment in favor of one who attacks a chattel mortgage on the ground of fraud that some of the circumstances recited in the special finding might be deemed evidences of fraud.

DEMAND.—When Not Necessary.—A party who is brought into court at the suit of another is excused from making a demand which might be required if he were the moving party.

From the Lawrence Circuit Court.

M. F. Dunn and *G. G. Dunn*, for appellants.

G. W. Friedley, *E. D. Pearson*, *A. G. Cavins*, *E. H. C. Cavins* and *W. L. Cavins*, for appellees.

ELLIOTT, C. J.—The creditors of Samuel C. Sadler brought this suit to set aside a chattel mortgage executed by him to his wife, Sarah Q. Sadler. The mortgage was executed, as appears from the allegations of the appellants' complaint, five days prior to the execution of a deed of general assignment by Samuel C. Sadler to William H. Martin for the benefit of the assignor's creditors. It is charged that the mortgage was executed without consideration and for the purpose of defrauding the creditors of the mortgagor.

The second paragraph of Mrs. Sadler's answer alleges that the mortgage was executed to secure a debt of twenty-two hundred dollars due her from her husband, and that it was executed in good faith, and that the assignment to Martin was made subject to the lien created by it.

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This answer is certainly good, although, in view of the fact that the general denial was filed, it may have been unnecessary. It is too clear to require discussion that, if the mortgage was executed in good faith and upon a sufficient consideration, it can not be set aside by the creditors on the ground of fraud.

The cross complaint sets forth the mortgage, states the consideration for which it was executed, shows that the debt due her is unpaid, and avers that William H. Martin, the assignee of the mortgagor, "for the purpose of executing his trust and to the end that the property might bring the best price, solicited her to permit him to sell the property; that she assented; that he did sell the property for the sum of \$4,650." The prayer is that the mortgage lien of the cross complainant may be transferred to the proceeds of the sale of the mortgaged property.

The chief ground taken in support of the assault upon the cross complaint is, that it is bad because it does not aver that the mortgagee had taken some steps to enforce the lien of her mortgage. The basis of the argument is asserted to be in the provision of the statute concerning voluntary assignments, which reads thus: "Before the holder of any lien or encumbrance shall be entitled to receive any portion of his debt out of the general fund, he shall proceed to enforce payment of his debt, by sale or otherwise, of the property on which such lien or encumbrance exists." R. S. 1881, section 2674. This provision of the statute, it is obvious, does not apply to the case before us, for here the mortgagee is not seeking payment of the mortgage debt out of the general fund. The cross complainant does not ask that any part of the general fund be appropriated to the payment of her debt, but asks only that the mortgage be enforced against the proceeds of the sale of the mortgaged property, so that the provision of the statute quoted is totally irrelevant.

The third paragraph of the answer to the cross complaint is founded on an agreement between the assignee and the

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mortgagee, wherein the former agreed to sell the mortgaged property and account to the latter for the proceeds of the sale. We perceive no taint of wrong or illegality in such an agreement. The assignee, as the representative of the creditors, might, as it appears he did, regard it for the interests of the creditors to himself sell the property and apply the proceeds to the payment of the lien, and in assenting to his desire in that particular, the mortgagee did not lose her mortgage security. At all events, her assent did not deprive her of the benefit of her mortgage. It seems too clear to require discussion that the creditors can not take advantage of their representative's promise and destroy the mortgage. He stands as their representative, and they can not, by repudiating his contract, get the avails of a sale which he had promised to pay to the mortgagee who had given him authority to sell the mortgaged property.

If it were granted that the assignee failed in his duty by omitting to petition the court to sell the property, it would by no means follow that the mortgagee must lose her security. If the representative of the creditors caused them loss by a breach of duty, their recourse would be against him and his sureties, for they can not, by repudiating his contract, entail loss upon the mortgagee who trusted him. But it does not appear that any loss resulted from the act of the assignee in selling the property; for aught that appears, it was the best course that could have been taken.

A suit to set aside a mortgage is of equitable cognizance, and in this instance there was no error in refusing a trial by jury. *Hendricks v. Frank*, 86 Ind. 278; *Evans v. Nealis*, 87 Ind. 262; *Quarl v. Abbott*, 102 Ind. 233, see p. 243.

In arguing the questions which counsel conceive arise on the special finding, much time is devoted to the question of fraud, it being assumed that there was a fraudulent purpose on the part of the mortgagor and mortgagee. This argument is built on a false basis, for, where there is no motion

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for a new trial, the facts stated in the special finding are assumed to be true, and assuming the facts to be true no fraud existed. This follows from the familiar rule, that facts not stated in a special finding are presumed not to exist as against the party having the burden of proof. *Vinton v. Baldwin*, 95 Ind. 433, and cases cited; *Mitchell v. Colglazier*, 106 Ind. 464; *Cincinnati, etc., R. W. Co. v. Gaines*, 104 Ind. 526; *Kurtz v. Carr*, 105 Ind. 574; *Rice v. City of Evansville*, 108 Ind. 7.

Fraud is by our statute made a question of fact, and should be found as a fact. *Rose v. Colter*, 76 Ind. 590. But, if it were conceded that an inference of fraud might be drawn from evidence recited in the special finding, still, the appellant could not prevail, for the evidence recited—and, be it said, improperly recited in the special finding—does not necessarily lead to the inference that the mortgagee was guilty of fraud.

The mortgage provides that the mortgagor may remain in possession, but this was not in itself fraudulent. Nor is the fact that the mortgagee permitted the mortgagor to assign the property, sufficient to constitute the mortgage a fraudulent one. The grant of permission to sell the mortgaged property may be, and, doubtless, often is, evidence of fraud, but it does not, of itself, condemn the transaction. Many circumstances are valuable as evidences of fraud, but these circumstances can not supply the place of a finding of the fact that fraud existed. It is not enough to justify a judgment in favor of one who attacks a chattel mortgage on the ground of fraud that some of the circumstances recited in the special finding might be deemed evidences of fraud, for there is an essential difference between the material fact that fraud exists and circumstances which tend to prove it. *Goff v. Rogers*, 71 Ind. 459; *McLaughlin v. Ward*, 77 Ind. 383; *Morris v. Stern*, 80 Ind. 227, see p. 231; *McFadden v. Hopkins*, 81 Ind. 459; *Jarvis v. Banta*, 83 Ind. 528; *Louthain v. Miller*, 85 Ind. 161; *Berghoff v. McDonald*, 87 Ind. 549; *McFadden*

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v. *Fritz*, 90 Ind. 590; *Dessar v. Field*, 99 Ind. 548; *Tucker v. Conrad*, 103 Ind. 349; *Elston v. Castor*, 101 Ind. 426, see p. 445.

The doctrine of the case last cited forcibly applies here, for it was there said: "The court below found these facts, but failed to find the ultimate fact, that in all this there was any collusion between the brothers, or that there was any fraud, or intent to defraud any one. If appellants were satisfied that the several facts mentioned were badges of fraud, and that fraud in fact should have been found, their proper course was by a motion for a new trial. Fraud in such cases is a question of fact, and hence we can not determine it here as a matter of law from the facts here found."

It is well settled by the adjudged cases that a debtor may prefer a creditor provided the preference is made in good faith. In this instance there is nothing in the special finding impeaching the good faith of the mortgagor or mortgagee.

It was incumbent on the appellants to prove that the mortgage was fraudulent, as that is the gravamen of their complaint, so that, upon them, rested the burden of proof, and, under the rule of which we have spoken, the special finding when silent is deemed against them. It must, therefore, be held that as the mortgage appears from the special findings to have been executed five days prior to the deed to the assignee, it is not part of the assignment. If it was part of the assignment, then it devolved upon the appellants to prove that fact.

The appellants brought the appellee into court and challenged her to litigate the matters in controversy. As she was not the moving party, it was not necessary for her to make a demand. We are inclined to think it would not have been necessary had she begun the litigation, but this point we need not decide, for, having been put to her defence by the challenge of the appellants, she was under no obligation to make any demand save by her pleadings in court.

Judgment affirmed.

Filed Jan. 14, 1887.

Voss et al. v. Eller.

No. 11,971.

VOSS ET AL. v. ELLER.

MORTGAGE.—*When Deed and Contemporaneous Contract Constitute a Mortgage.*—*Conditional Sale.*—Where, upon construing together a deed absolute on its face and a contemporaneous written contract, it appears that at the time they were executed there was a pre-existing debt owing to the grantee, the subsequent payment of which by the grantor would entitle him to a reconveyance of the property, and that the grantee surrendered no remedy previously available to him for the collection of his debt, and that the obligation of the grantor remained the same, such deed and contract constitute a mortgage, and not a conditional sale.

NEW TRIAL.—*As of Right.*—*Cancellation of Mortgage.*—*Quieting Title.*—A new trial as of right is not allowable in a suit to have a deed adjudged to be a mortgage and to procure its cancellation, as satisfied, even though the complaint also prays for a quieting of title.

ESTOPPEL.—*Mortgage.*—*Claim of Title.*—One who takes a mortgage of real estate is estopped to claim title thereto.

From the Hamilton Circuit Court.

T. J. Kane and T. P. Davis, for appellants.

D. Moss and R. R. Stephenson, for appellee.

MITCHELL, J.—This action was commenced by James G. Eller against the heirs and personal representatives of Gustavus H. Voss, deceased.

The complaint alleged that the plaintiff, Eller, being largely indebted to the decedent, Gustavus H. Voss, conveyed to the latter in his lifetime certain tracts and parcels of land in Hamilton county, by a deed absolute in form, but which was in fact intended as a mortgage to secure the payment of such indebtedness.

It is also alleged that contemporaneously with the execution of the deed, and as a part of the same transaction, the plaintiff and the decedent entered into a written contract in relation to the conveyance. This contract, as well as the deed, is embodied in the complaint, and is alleged to have had the effect to constitute the deed and contract a mortgage. It is further alleged that after the deed and contract were executed, the plaintiff had, pursuant to the contract, sold

109	260
124	51
109	260
129	260
109	260
130	499
109	260
138	86
109	260
149	119

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part of the land, and that Voss had, in accordance with the agreement, made conveyances to the purchasers to whom sales were thus made. From the proceeds of sales, from rents received by the decedent, and from other payments made to him, it is averred that the indebtedness to secure which the deed had been executed, had, prior to the commencement of the action, been fully paid and satisfied.

The complaint charges that notwithstanding the debt so secured had been in this manner fully paid, Voss in his lifetime refused to reconvey the lands remaining unsold, and that the defendants, the heirs and personal representatives of Voss, were asserting some interest in or lien upon such lands on account of the uncanceled mortgage.

The prayer of the complaint is, that the court adjudge the deed to be a mortgage, and order it to be satisfied of record, and that the title to the land be quieted in the plaintiff.

The agreement, executed concurrently with the deed, after reciting that a conveyance of certain lands had that day been made by Eller to Voss, proceeded as follows:

"Now said deed is made for the payment of certain debts and claims said Voss now holds against said Eller, to wit: One mortgage of (\$5,000) principal, and the several interest notes due and to become due thereon, supposed to be about \$1,500, but is to regulate and determine by the amount of said notes which Voss will hold on the 1st day of May next; and also for the payment of several judgments which Voss now holds against said Eller, as appears by the records of the Hamilton Circuit Court, supposed to be \$1,500, more or less, as will appear from the docket of said court. Now Voss agrees that said Eller may and shall proceed to sell said farm, which is to be done between this and the 1st day of next May, but he is not to sell it for less than the amount of said mortgage, interest and taxes, and all it will bring over that sum is to be applied to payments on said judgments. Eller is also to proceed to sell said lots, and is to have a period of five years to do so in, by paying all taxes

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and assessments against the same and ten per cent. interest annually to Voss upon said sum due Voss, and Voss agrees to make warranty deeds to all purchasers of said property if made to good parties and upon such terms as is usual. All deferred payments to be secured by mortgage upon the property sold, good, sound bank notes with ten per cent. interest, and so soon as all claims of said Voss have been paid with the said interest, Voss agrees to deed any of said property which may revert to said Eller free of all costs whatever, in full for his commission for selling said property, and make no other claim against said Voss for his services; and Eller further agrees to use his best endeavors to sell said property at as early a day as possible. None of said lots are to be sold for less than \$200 each without the consent of Voss. Eller may subdivide said farm and sell the same in any such parcels as he and Voss may deem the best subdivision. None of said lands south of the railroad to be sold for less than seventy dollars per acre, and that on the north less than \$100; and it is agreed now that Eller may sell the thirty-eight acres on the south by itself. Each has a copy.

"G. H. Voss.

"June 8th, 1876.

JAMES W. ELLER."

The court below having overruled a demurrer to the complaint, the question first to be considered is as to the legal effect of the deed and the contract above set out. Construed together, as it is conceded they must be, do they constitute a mortgage, or a conditional sale?

On behalf of the appellants the argument is, that the recital that "said deed is made for the payment of certain debts and claims said Voss now holds against said Eller," is conclusive of the fact that the previously existing indebtedness was extinguished by the conveyance of the land. The appellants' position is, that there can be no mortgage without a subsisting indebtedness, and, they argue, since by the express terms of the agreement, the conveyance was accepted in payment of the pre-existing debts, the transaction was not

a mortgage. Upon the facts as assumed, the conclusion might well follow.

While each case involving a controversy such as the one before us, must be decided in view of its own distinguishing circumstances, some rules of more or less general application are of controlling influence in determining whether a given transaction is of one character or the other.

A recognized method by which to determine whether a deed, absolute on its face, may nevertheless operate as a mortgage, is to ascertain whether or not at the time of its execution, there was a pre-existing or concurrently created debt by way of loan, owing to the grantee, the subsequent payment of which, in pursuance of a contemporaneous agreement, entitled the grantor, or debtor, to a reconveyance of the estate. An absolute conveyance without any other consideration than that assumed, coupled with an agreement to reconvey, will be regarded as a mortgage.

Whatever form the transaction may have assumed, if the relation of debtor and creditor, with its reciprocal rights, continues between the contracting parties, or if such relation was then created, by a loan or advance, and if the agreement, whether in the deed or in a separate instrument concurrently executed, is such that the debtor, by merely paying his debt, becomes entitled to insist upon a reconveyance, or to otherwise defeat the estate conveyed, the conveyance will be regarded as a security for such continuing or newly incurred debt. *Cox v. Ratcliffe*, 105 Ind. 374, and cases cited (2 West. R. 811, and note); *Cornell v. Hall*, 22 Mich. 377; *Peugh v. Davis*, 96 U. S. 332; *Russell v. Southard*, 12 How. 139; *Hanlon v. Doherty*, *ante*, p. 37; *Jones Mortg.*, sections 242, 258, 265, 269.

A deed, and an agreement in writing, executed contemporaneously therewith, having the characteristics above stated, constitute a mortgage by construction of law. Parol evidence will not be received for the purpose of showing that the parties intended that a transaction evidenced by writings

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of that description, should constitute a sale. *Proctor v. Cole*, 66 Ind. 576; *Jones Mortg.*, sections 248, 277.

It does not follow that a debtor may not convey property to his creditor in payment of an existing debt, nor that the two may not, by a contract made at the time of a conveyance so made, thereafter occupy the relation of vendor and purchaser toward each other, in respect to the land so conveyed. If the pre-existing liability of the debtor is extinguished, and the personal remedy of the creditor is released in consideration of a sale and conveyance of the property, the fact that a contract to resell, upon certain terms and conditions, is entered into, does not constitute the transaction a mortgage. Or, if, as a result of the agreement, the debt is extinguished, leaving the grantor the option to pay or not, as he pleases, and thereby entitle himself to a reconveyance, the transaction operates as a conditional sale. *Hays v. Carr*, 83 Ind. 275; *Conney v. Alexander*, 7 Cranch, 218; *Flagg v. Mann*, 14 Pick. 467; *Smith v. Crosby*, 47 Wis. 160; *Jones Mortg.*, sections 259-261.

This brings us to consider the agreement heretofore set out, the legal effect of which is to be determined by the whole instrument.

The recital that the conveyance was made in payment of certain debts and claims, held by Voss against Eller, must be considered in the light of what follows.

The claims mentioned are, first, one mortgage of \$5,000, principal, and the several interest notes "due and to become due thereon," supposed to be about \$1,500, the amount to be determined "by the amount of said notes which Voss will hold on the 1st day of May next."

This makes it certain that the mortgage debt was not treated as extinguished by the conveyance. Otherwise there could have been no propriety in stipulating that the amount of interest "due and to become due" thereon, should be estimated by the amount of interest notes which should be held by Voss nearly one year after the conveyance.

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The other claims, which the recital relied on applies to as having been paid by the conveyance, are certain judgments appearing on the records of the Hamilton Circuit Court, in favor of Voss against Eller, which were supposed to amount to about \$1,500. The contract provides that Eller shall proceed to sell the farm prior to the 1st day of May next ensuing, the sale to be for a sum not less than the mortgage debt, interest and taxes, and that all that should be realized from such sale over that sum was to be applied to the payment of the judgments.

This provision makes it clear that neither the mortgage debt, nor the debts evidenced by the judgments, were extinguished, or treated as canceled.

The contract stipulates further that so soon as all claims of Voss had been paid, with interest, the latter agreed to convey "any of said property which may revert to said Eller, free of all costs in full for his commission in selling said property."

As there are no other claims referred to in the written agreement, except the mortgage debt, and interest notes due, and to become due, and the judgments therein mentioned, it conclusively follows that it was the payment of these original claims, and the interest thereon, that, under the very terms of the contract, was to entitle Eller to a reconveyance of any of the property remaining unsold.

Looking behind the mere form to the substance of the transaction, it becomes apparent that Voss surrendered none of the remedies which were available to him for the collection of his claims against Eller, prior to the conveyance in question, nor did he thereby acquire any new rights, except to retain the title as a security until his pre-existing claims were actually paid. Both the form and extent of Eller's obligations remained the same, after as before the deed and agreement. Such being the fact, the real nature of the transaction can neither be obscured nor controlled by mere gen-

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eral statements. We conclude that the deed and accompanying contract constitute on their face a legal mortgage.

At the hearing, the appellee was permitted to give in evidence certain admissions made by, and conversations had with the decedent in respect to the extent of the indebtedness owing by Eller to Voss, as compared with the value of the property subsequently conveyed. The conversations objected to were had about one month prior to the conveyance in question. It is said, in objection to the ruling admitting this evidence, that it was, in effect, an effort to contradict the written agreement subsequently entered into between Eller and Voss. This view is not sustained by the record. What was said by the witness in answer to the question objected to, was as follows:

"He, Voss, wanted me to give my obligation to him for the \$5,000 that James owed him and take the property and clear it out and make all out of it I could, and help James out with his debt. He claimed there was property enough there to pay all his debts and leave him some, and he was afraid the creditors would just come in and take it all; he said that would take it all and leave him nothing, and he wanted me to take the \$5,000 and two interest notes that were back."

We perceive nothing in the foregoing which in any degree contradicts the writing.

The appellants contend further, that the finding of the court that the debts due from Eller to Voss had been fully paid prior to the commencement of the suit, is not sustained by the evidence.

Without entering upon a detailed examination of the evidence here, it is enough to say, it fairly shows that the debts were paid.

Lastly, it is contended that the court erred in not granting the appellants a new trial, as a matter of right.

The suit was, in effect, a bill to redeem, and to procure the cancellation of a mortgage. Having already determined that the deed and written agreement executed with it constituted

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a mortgage, it must be held that the nature and character of the action to procure its cancellation, was in no sense different from a suit to procure the cancellation of any other mortgage. That the complaint also prayed that the plaintiff's title might be quieted, is not controlling. The action did not involve the title to land to any greater extent than title is involved in any other suit to declare a mortgage satisfied, and to procure its cancellation. Having taken a mortgage the mortgagee was estopped to claim the title. *Conklin v. Smith*, 7 Ind. 107. There was no error.

The judgment is affirmed, with costs.

Filed Jan. 13, 1887.

No. 12,582.

SILVERS ET AL. v. CANARY.

PLEADING.—*Reply*.—*Sufficiency of*.—*Demurrer*.—A reply, to be sufficient on demurrer, must be good as to the entire answer to which it is addressed.

WILL.—*Devise of Life-Estate*.—*Power to Dispose of Fee*.—A testator devised to his wife certain real and personal property for life, and directed that what should not be consumed at her death should be divided among his children.

Held, that she had power to convey the fee in the land, and might do so without referring to the will.

From the Sullivan Circuit Court.

J. W. Shelton, J. S. Bays, J. C. Chaney, C. B. Robbins, J. T. Hays and *H. J. Hays*, for appellants.

J. C. Briggs and *W. C. Hultz*, for appellee.

ELLIOTT, C. J.—The appellee brought this action to quiet title to real estate of which she claimed to be the owner.

The appellants answered in three paragraphs, the first of which is the general denial. The reply of the appellee is addressed to the entire answer, and purports to be a reply to

109	267
137	652
139	72
109	267
146	484
109	267
155	154
155	155

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all of that pleading. It is, in fact, not sufficient as to the first paragraph of the answer. It is a familiar rule of pleading that a reply must be good as to the entire answer to which it is addressed or it will be bad on demurrer. This rule makes it plain that the trial court erred in overruling the appellants' demurrer to the appellee's reply.

For the error pointed out the judgment must be reversed, but, as the will of Samuel Silvers, upon which the titles of the respective parties depend, must be construed and acted upon when the case gets back into the trial court, it is thought to be our duty to give it a construction now. The first item of the will reads thus: "After my decease, and all my just debts paid, to my dearly beloved wife, during her natural life, I will and bequeath our homestead, with all of our farm land, containing about twenty-nine acres, more or less. Also one thousand dollars of my personal property, of whatever she may choose to select, during her natural life. If any of my personal property or real estate, say lot 44, New Lebanon, not set apart heretofore, will be sold by my executors or administrators and divided as I hereafter direct. Also in same manner what may not be consumed of personal and real estate at my wife's decease."

The second item of the will is as follows: "To my daughter, Susan M. Merry, and her heirs, I will and bequeath one-fifth part of my estate after all my just debts are paid, and herein not otherwise appropriated."

The third, fourth, fifth and sixth items respectively, make disposition of the four-fifths of the testator's estate to children and grandchildren, in terms similar to those used in the second item.

The question is, does the will devise to the widow an estate in fee simple in the real estate described in the first item or does it invest her with the power of disposing of the fee? We think the case is governed by the decision in *Clark v. Middlesworth*, 82 Ind. 240, and that upon the authority of that case the widow had power to convey the fee. It will

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be observed that the words "what may not be consumed of real and personal estate at my wife's decease," found in item first of the will, are quite as strong as those used in the will involved in the case referred to, and in addition to this it must be borne in mind that in all the subsequent items of the will the testator is careful to limit the estate devised to property not "herein otherwise appropriated."

It is evident from these clauses of the will, that the testator intended to appropriate solely for the benefit of his widow the property described in the first item of his will, and to give his children and grandchildren only so much of it as remained unconsumed at the death of his widow. It would be a perversion of the language of the will to award the devisees named in the items of the will subsequent to that making the devise to the wife any part of the land there devised to her; and it would also be in plain disregard of the testator's intention, for it is in terms and in effect appropriated absolutely to her. *Van Gorder v. Smith*, 99 Ind. 404, recognizes the general principle which applies here, for it is there held, and the decision is well supported, that if an estate is devised for life, with a power of disposition, the devisee may convey the fee in the land devised.

A devisee of land invested with the power of disposition, may convey the land without referring to the will. *Clark v. Middlesworth*, *supra*; *South v. South*, 91 Ind. 221 (46 Am. R. 591); *Downie v. Buennagel*, 94 Ind. 228.

Judgment reversed.

Filed Jan. 12, 1887.

Cooper, Administrator, v. Williams.

No. 12,724.

COOPER, ADMINISTRATOR, v. WILLIAMS.

DECEDENTS' ESTATES. — *Administrator. — Care Respecting Property.* — An administrator is required to adopt such precautions against loss to property coming under his care as ordinarily prudent men are accustomed to employ with respect to their own property.

SUPREME COURT. — *Weight of Evidence.* — A judgment will not be reversed on the weight of the evidence.

From the Gibson Circuit Court.

M. W. Fields and *J. W. Ewing*, for appellant.

W. M. Land and *J. B. Gamble*, for appellee.

MITCHELL, J. — Cooper, as administrator of the estate of John D. Williams, deceased, submitted his final settlement report to the Gibson Circuit Court at its September term, 1885. After charging himself with the amount of the inventory of personal property, and taking credit for property taken by the widow, and for various items of disbursements, there appeared to be in his hands the sum of \$365.69.

In a statement appended to the report, the administrator represented to the court that an item of \$350, which appeared on the inventory with which he was charged, was the appraised value of a quantity of corn in cribs, estimated, when appraised, at one thousand bushels. He stated further, that when he came to sell and weigh out the corn, it was found to be badly damaged and unmerchantable; that it fell short of the estimate, and that for these reasons, and for the further reason that the purchaser of fifty-four bushels subsequently became insolvent, he had only realized the sum of \$162.45 for the corn. He asked that he might be credited on his account with \$187.55, the difference between the amount realized and the amount with which he stood charged on the inventory.

At the proper time, Emily Williams, widow of the decedent, appeared and filed exceptions to the report. She alleged that, on the 1st day of November, 1883, when Cooper was

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appointed and qualified as administrator, the estate owned a crop of corn, consisting of eighty acres, standing in the field ready to be gathered; that the crop would have yielded an average of seventy-five bushels per acre, and was worth twenty-five cents a bushel in the field, and would have brought that if it had been gathered and sold seasonably, and that after deducting twelve bushels per acre, the landlord's share, there would have remained five thousand bushels upon which the estate could have realized twenty-five cents a bushel. She charges that the administrator failed to inventory the corn until the 5th day of the following March; that he refused to sell it either at public or private sale, and refused the decedent's heirs permission to gather it in; that he neglected the crop and permitted it to stand in the field, which he knew was liable to overflow in seasons of high water, where it remained exposed to injury by floods until the month of February, 1884, when it was gathered into cribs, and afterwards inventoried. Meanwhile it is alleged, the crop was overflowed by high water and damaged in the sum of \$1,000. The exceptor prayed that the administrator be charged with \$1,250 on account of the corn crop, instead of \$350.

The matter being thus at issue, was submitted to the court for trial. After hearing the evidence the court found and adjudged that the administrator was not entitled to the deduction claimed by him on account of the alleged loss sustained in failing to realize the sum at which the corn was appraised. His claim for services as administrator, amounting to \$18.26, was also rejected. Otherwise his account was approved.

The administrator brings the record here and asks a reversal on the evidence.

The only question presented for the consideration of this court, therefore, is: Was there any legal evidence fairly tending to sustain the finding and judgment of the court below?

The evidence discloses that the appellant owned the land

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upon which the corn was raised, the decedent having rented it under an agreement that he was to yield to the landlord, as rent, twelve bushels of shelled corn per acre, to be delivered on the river bank in sacks.

All the witnesses agree that the crop would have yielded fifty bushels per acre and upward, if it had been gathered before the overflow. As it was, when gathered, it produced one thousand one hundred and fifty-one bushels of shelled corn and one hundred and eighty-eight and a half bushels of ears. Out of this the appellant took as his rental, eight hundred and sixty-four bushels of the shelled corn, leaving for the estate, two hundred and eighty-seven bushels, besides the corn in the ear. From the proceeds of this was to be paid the expense of gathering, shelling and sacking the whole. To say the least, the result attained was most disastrous for the estate.

The land upon which the corn was grown constituted part of the Wabash bottom, and the evidence tended to show that it was accustomed to overflow during the winter freshets. There was evidence, some of it from the appellant's witnesses, tending to show that, by the exercise of diligence, the corn might have been gathered in the first part of November, following the appellant's appointment as administrator. During the middle and latter part of the month the land was submerged. The water did not recede until in December. After the water receded the corn was gathered diligently.

Upon the whole evidence, while there may be some question whether the preponderance lies on the side of the appellant's diligence, or whether it establishes negligence, there can be no dispute but that there was evidence which fairly supports the conclusion that the appellant failed to exercise that degree of promptness in having the crop secured that its hazardous situation required.

With respect to property which comes under the care of administrators, they are required to adopt such precautions against loss, and exercise such forethought for its security as

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ordinarily prudent men are accustomed to employ in reference to their own property.

There is evidence in the record fairly justifying the conclusion, which the court below must have reached, that the appellant failed to conform to this requirement.

As we are not permitted to consider evidence with a view of determining on which side the preponderance lies, we can not disturb the finding below.

Judgment affirmed, with costs.

Filed Jan. 15, 1887.

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127	543
100	273
123	100

No. 12,700.

THE PHENIX INSURANCE COMPANY v. ALLEN ET AL.

INSURANCE.—*Personal Property.*—*Misdescription of Location.*—*Reformation.*—

Where the agent of an insurance company, without the knowledge or consent of the insured, inserts a false description of the location of personal property in the application, thereby causing a misdescription in the policy, these facts, in an action on the policy, may be averred and proved without asking a reformation of either instrument.

SAME.—*Estoppel.*—In such case the insurance company is estopped from setting up the misdescription as a defence to the action.

From the Jefferson Circuit Court.

C. Walker, for appellant.

W. R. Johnson, for appellees.

NIBLACK, J.—This was an action by David Allen, Jr., and Frank Allen against the Phenix Insurance Company of Brooklyn, in the State of New York, upon a policy of insurance issued upon a lot of hay and other property, both real and personal, and situate in Switzerland county.

The action was commenced in the Switzerland Circuit

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Court, but the venue was afterwards changed to the court below.

The complaint was in three paragraphs. The first and third paragraphs counted upon the policy of insurance, alleging the loss of the hay and some other personal property by fire.

The second paragraph was in form a complaint upon the policy, but alleged a mistake in its execution, and asked a reformation in accordance with what was claimed to have been the true intention of the parties. This paragraph was held to be an equitable proceeding, and triable by the court alone.

Demurrers to each paragraph of the complaint were severally overruled.

The first and third paragraphs were submitted to a jury for trial. After the evidence was concluded the circuit court instructed the jury to return a verdict for the defendant on the first paragraph, which they accordingly did. But upon the third paragraph the verdict was for the plaintiffs, and they had judgment on the verdict.

Error is assigned upon the overruling of the demurrer to the third paragraph of the complaint, and upon the refusal of the circuit court to grant a new trial.

The third paragraph of the complaint charged that the plaintiffs were, on the 9th day of May, 1884, the owners of a forty-acre tract of land in section five (5), in township two (2) north, of range three (3) west, on which had been erected and were standing a one-story, shingle-roof, frame and log dwelling-house, and a shingle-roof, frame granary; that on the same day, the plaintiffs were, as lessees, occupying and cultivating a tract of land containing one hundred and eighty-four acres in section ten (10), in the same township and range, belonging to another person; that at the same time the plaintiffs were the owners of twenty-five tons of hay, two horses, and a considerable amount of other specifically described personal property situate and kept in a barn located

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on said leased tract of land in said section ten (10); that, on said 9th day of May, 1884, one Clifford Fish, who was the agent of the defendant, visited the plaintiffs at said barn on said section ten (10), and proposed that the defendant would issue to them a policy of insurance against loss, by fire and lightning, on their said destructible property, which he then saw and examined, for the aggregate sum of \$760, to run from the 1st day of May, 1884, for the term of five years, such policy of insurance to be issued in consideration of the sum of \$11.50, for which the plaintiffs might execute their promissory note, payable on the 1st day of May, 1885; that the plaintiffs accepted the offer thus made to them, and executed to the defendant their promissory note for \$11.50, payable on said 1st day of May, 1885, and signed an application for a policy of insurance to be issued in accordance with the agreement which had been entered into concerning the same; that said application, when it was signed and delivered to the said Fish, was blank as to the location of the property on which the policy of insurance was to be issued; that in this blank condition the said Fish delivered the application to one Addison Works, at the city of Vevay, who was the local agent of the defendant for the county of Switzerland; that the said Works, without the knowledge or consent of the plaintiffs, filled up the blank in said application so as to make it appear that the personal property, as well as the buildings to be included in the policy of insurance, was situate upon their forty-acre tract of land in section five (5), hereinabove referred to; that with the blank so filled up, the said Works transmitted such application to the defendant's office in the city of Chicago, in the State of Illinois; that the defendant thereupon issued to the plaintiffs a policy of insurance upon the property mentioned in the application in accordance with the original agreement with Fish, except that the personal property was erroneously described therein as situate in section five (5), instead of in section ten (10), following, in that respect, the description of it given by the said Works as it was

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by him wrongfully written into the application ; that the personal property covered by said policy of insurance, except the two horses, being at the time situate upon the said section ten (10), as the said Fish well knew, was, on the 20th day of November, 1884, destroyed by fire, of which the defendant was duly notified ; that the plaintiffs did not know, until after the greater part of the property insured was so destroyed by fire, that such property was described in the policy of insurance as situate upon said section five (5), as hereinabove set forth.

It is claimed that this paragraph of the complaint was bad upon demurrer, upon the ground that it was a complaint in part upon a written contract, and in part upon a parol contract, which latter contract had been merged into and superseded by the written contract ; also upon the ground that it rested the right of the plaintiffs to recover, upon extrinsic facts to be proven by parol evidence, varying and contradicting the alleged written contract of insurance.

No rule of law is more firmly established than the one which declares that a parol agreement is merged in, and superseded by, a subsequent written agreement embracing the same subject-matter. It is equally well settled as a general rule, that parol evidence is inadmissible to either vary or contradict a written instrument. It is also true, that the locality in which goods are kept is an important element in a contract of insurance, and that ordinarily it must be made to appear that the property was at the place designated in the policy when it was destroyed. 1 Wood Fire Ins., section 47. But no one of these rules is applicable to the case made by the paragraph of the complaint under consideration. The averments of this paragraph were to the effect, that the words on the face of the application which gave a false description of the location of the personal property afterwards destroyed by fire, and which caused a misdescription of such location to be inserted in the policy of insurance, were written into the application by an agent of the defendant without

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the knowledge or consent of the plaintiffs, and hence never became a part of the application which the plaintiffs signed, and for which they were, in any manner, responsible. If this misdescription of the location of the personal property was so written into the application, without the knowledge or consent of the plaintiffs, it was a fact which they were entitled to aver in their complaint and to prove at the trial, without asking a reformation either of the application or of the policy of insurance issued upon it. The writing into the application the alleged misdescription in question by the defendant's agent, without the knowledge or consent of the plaintiffs, estopped the defendant from setting up such misdescription as a defence to the action. These general principles governing actions on policies of insurance are well recognized by numerous authorities. 1 Wood Fire Ins., section 49; May Ins., section 141; *American, etc., Ins. Co. v. McLanathan*, 11 Kan. 533; *Lynchburg Fire Ins. Co. v. West*, 76 Va. 575 (44 Am. R. 177); *Combs v. Hannibal, etc., Ins. Co.*, 43 Mo. 148; *Planters' Ins. Co. v. Myers*, 55 Miss. 479 (30 Am. R. 521); *Planters' Ins. Co. v. Sorrels*, 1 Baxter, 352; *Woodbury, etc., Ass'n v. Charter Oak, etc., Ins. Co.*, 31 Conn. 517; *Carpenter v. Providence, etc., Ins. Co.*, 2 Am. Leading Cases, 865; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Plumb v. Cattaraugus, etc., Ins. Co.*, 18 N. Y. 392; *Insurance Co. v. Wilkinson*, 13 Wall. 222.

Evidence was introduced, and instructions to the jury were given and refused, and the cause was in all respects tried in accordance with the general principles governing actions on policies of insurance above enumerated. There was also evidence tending to sustain the verdict, and hence no sufficient reason has been shown for a reversal of the judgment. *North British Mercantile Ins. Co. v. Crutchfield*, 108 Ind. 518.

The judgment is affirmed, with costs.

Filed Jan. 25, 1887.

Eastman v. The State.

13,495.

EASTMAN v. THE STATE.

MEDICINE AND SURGERY.—*Regulating Practice of.*—*Constitutional Law.*—*Police Power.*—The Legislature has power to regulate the practice of medicine and surgery, and to prescribe the qualifications of applicants for license.

SAME.—*License.*—*County Clerk.*—*Judicial Power.*—The power conferred upon the county clerk to accept or reject an application for license is not a judicial one.

SAME.—*Exceptions to Statute.*—*When will Not be Created.*—The courts can not create exceptions to a statute where its words are free from ambiguity and its purpose plain.

SAME.—*Wisdom of Statute.*—The wisdom or expediency of a statute is a question solely for the Legislature.

CRIMINAL LAW.—*Indictment.*—*Language of Statute.*—It is sufficient to charge an offence in the language of the statute.

From the Steuben Circuit Court.

G. B. Adams, for appellant.

L. T. Michener, Attorney General, and W. E. Hord, for the State.

ELLIOTT, C. J.—The appellant challenges the validity of the act regulating the practice of medicine and surgery, and on this challenge arises the principal question in the case.

The police power of a State is very broad and comprehensive. It has been variously defined by the courts and text-writers. It is, said one of the courts, "that inherent and plenary power in the State, which enables it to prohibit all things hurtful to the comfort, safety and welfare of society." *Lakeview v. Rose Hill Cemetery Co.*, 70 Ill. 191 (22 Am. R. 71). "All laws," says another court, "for the protection of the lives, limbs, health and quiet of persons, and the security of all property within the State, fall within this general power of the government." *State v. Noyes*, 47 Maine, 189.

In *Thorpe v. Rutland, etc.*, R. R. Co., 27 Vt. 140, it was held, that, under the general police power of the State, "persons and property are subjected to all kinds of restraints and burdens, in

109	278
126	196
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126	664
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140	632
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147	634
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150	617
150	618
109	278
153	92
109	278
155	188
109	278
159	213
159	496
109	278
163	514
109	278
167	11

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order to secure the general comfort, health, and prosperity of the State, of the perfect right in the Legislature to do which no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned."

In speaking of this power, it was said by this court, in *Hockett v. State*, 105 Ind. 250 (55 Am. R. 201), that "It extends to the protection of the lives, limbs, health, comfort and convenience, as well as the prosperity, of all persons within the State. It authorizes the Legislature to prescribe the mode and manner in which every one may so use his own as not to injure another, and to do whatever is necessary to promote the public welfare, not inconsistent with its own organic law."

The views expressed in these cases are well supported by authority. *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12 (48 Am. R. 692); *Cooley Const. Lim.* 572; *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 U. S. 703; *Live Stock Ass'n v. Crescent City*, 1 Abbott U. S. Rep. 388; *Slaughter-House Cases*, 16 Wall. 36.

The practice of medicine and surgery is a vocation that very nearly concerns the comfort, health and life of every person in the land. Physicians and surgeons have committed to their care the most important interests, and it is an almost imperious necessity that only persons possessing skill and knowledge should be permitted to practice medicine and surgery. For centuries the law has required physicians to possess and exercise skill and learning, for it has mulcted in damages those who pretend to be physicians and surgeons, but have neither learning nor skill. It is, therefore, no new principle of law that is asserted by our statute; but, if it were, it would not condemn the statute, for the statute is an exercise of the police power inherent in the State. It is, no one can doubt, of high importance to the community that health, limb and life should not be left to the treatment of ignorant pretenders and charlatans. It is within the power

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of the Legislature to enact such laws as will protect the people from ignorant pretenders, and secure them the services of reputable, skilled, and learned men, although it is not within the power of the Legislature to discriminate in favor of any particular school of medicine. When intelligent and educated men differ in their theories, the Legislature has no power to condemn the one or approve the other, but it may require learning and skill in the school of medicine which the physician professes to practice. *White v. Carroll*, 42 N. Y. 161 (1 Am. R. 503).

The rule requiring physicians to possess learning and skill is a very ancient one. *Bonham's Case*, 8 Coke R. 227; *College of Physicians v. Levett*, 1 Ld. Raym. 472. This rule of the common law has been incorporated in many of the State statutes, and these statutes have always been upheld.

The statute of Minnesota is very similar to ours, and it was held to be valid in *State v. State Med. Ex. Board*, 32 Minn. 324 (50 Am. R. 575), the court saying: "In the profession of medicine, as in that of the law, so great is the necessity for special qualification in the practitioner, and so injurious the consequences likely to result from the want of it, that the power of the Legislature to prescribe such reasonable conditions as are calculated to exclude from the profession those who are unfitted to discharge its duties, can not be doubted."

Speaking of a statute like ours, another court said: "We are of opinion that all of the provisions of the act under consideration, as above set out, and independent of any constitutional warrant for its enactment, would be maintainable under the police power of the State; that, under this general power, the Legislature is the proper judge as to what regulations are demanded in dealing with the property and restraining the actions of individuals." *Logan v. State*, 5 Texas App. 306.

The subject was examined in all its important phases in *Ex Parte Spinney*, 10 Nev. 323, and the statute declared valid.

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A like result was reached by the court in *Hewitt v. Charier*, 16 Pick. 353. A full discussion of the question will be found in *Fox v. Washington Territory*, 5 West Coast Rep. 339, where a similar result was reached. Judge Cooley strongly and unequivocally affirms the validity of statutes like ours. Cooley Torts, 289, 290. The question received a very careful consideration in *State v. Dent*, 25 W. Va. 1, and it was held that the statute was valid in every part.

For more than eighty years a similar statute has been in force in New York, and the courts of that State have uniformly regarded it as valid. *Sheldon v. Clark*, 1 Johns. 513; *Allcott v. Barber*, 1 Wend. 526; *Timmerman v. Morrison*, 14 Johns. 369; *Thompson v. Staats*, 15 Wend. 395; *Bailey v. Mogg*, 4 Denio, 60; *Finch v. Gridley*, 25 Wend. 469. In very many other cases such statutes have been enforced. *Antle v. State*, 6 Texas App. 202; *Musser v. Chase*, 29 Ohio St. 577; *Wert v. Clutter*, 37 Ohio St. 347; *Bibber v. Simpson*, 59 Maine, 181; *Thompson v. Hazen*, 25 Maine, 104; *State v. Gregory*, 83 Mo. 123 (53 Am. R. 565).

The appellant is right in asserting that the departments of the government are separate and distinct, and that a clerk of a county can not exercise judicial powers. *Smith v. Myers*, ante, p. 1, and cases cited. But he is wrong in affirming that the act under examination confers upon the clerk judicial powers.

The power to accept or reject an application for license, under the statute, is not a judicial one, although it may involve some exercise of discretion. *Elmore v. Overton*, 104 Ind. 548 (54 Am. R. 343); Cooley Torts, 411.

If an exercise of discretion constituted a clerk a judicial officer, then he would be such in every case in which he issues a writ, files a paper or approves a bond, for all these acts involve some exercise of discretionary power. The statute does not require the clerk to sit in judgment upon the sufficiency of the application for a license, for the affidavits prescribed and the diploma required constitute the evi-

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dence upon which the clerk must act. The diploma and affidavits compel him to grant the license, and it is, therefore, not possible to regard his duty as a judicial one. *Flournoy v. City of Jeffersonville*, 17 Ind. 169; *Betts v. Dimon*, 3 Conn. 107; *State, ex rel., v. Doyle*, 40 Wis. 175.

Whether the statute is a wise one or not is purely a legislative question, and so is the question whether it is reasonable or unreasonable. This doctrine was thus expressed in *Hedderich v. State*, 101 Ind. 564 (51 Am. R. 768): "Whether a statute is or is not a reasonable one, is a legislative, and not a judicial question. Whether a statute does, or does not, unjustly deprive the citizen of natural rights, is a question for the Legislature, and not for the courts. There is no certain standard for determining what are, or are not, the natural rights of the citizen. The Legislature is just as capable of determining the question as the courts. Men's opinions as to what constitute natural rights greatly differ, and if courts should assume the function of revising the acts of the Legislature on the ground that they invaded natural rights, a conflict would arise which could never end, for there is no standard by which the question could be finally determined."

Judge Cooley says: "Nor can a court declare a statute unconstitutional and void, solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the Constitution." Cooley Const. Lim. (5th ed.) 197. At another place this author says: "The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It can not run a race of opinions upon points of right, reason, and expediency with the law-making power." *Ibid.* 201.

The offence is charged in the language of the statute, and this is sufficient. *State v. Miller*, 98 Ind. 70, and cases cited;

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Graeter v. State, 105 Ind. 271 ; *Antle v. State*, 6 Texas App. 202.

In discussing the evidence, counsel assert that as the terms of the statute are broad and sweeping, courts must create exceptions in order to give it a just and reasonable effect. There are, perhaps, extreme cases where exceptions may be created by the courts, but these cases are very rare, and the authority to create exceptions is one to be exercised with great delicacy. It can never be exercised where the words of the statute are free from ambiguity and its purpose plain. It is only where the necessity is imperious, and where absurd or manifestly unjust consequences would otherwise certainly result, that the courts can create exceptions. This is not such a case. It is the purpose of the statute to prevent persons who do not possess the necessary qualifications to practice medicine or surgery, from inflicting injury upon the citizens by undertaking to treat diseases, wounds and injuries. It is the plain intention of the statute to keep out of the professions of medicine and surgery all who do not possess learning and skill sufficient to enable them to properly discharge the duties incumbent upon members of those honorable professions, and courts have no right to create an exception which will defeat that intention.

It is immaterial whether the person who undertakes to treat diseases or wounds does it for hire or not, for unless he is qualified as the statute requires, he must not undertake the treatment of diseases or wounds at all. The courts can not divide professional persons into classes, and assert that one class is within the law and the other not, for the law applies to all who assume the responsible duty of treating the sick, wounded or injured citizens, as well those who expect compensation for their services, as those who do not. The great object of the law is to allow none but skilled and learned persons to attempt to exercise functions and duties which require knowledge and skill, and it is not material whether re-

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ward is paid or promised, or the services are rendered without compensation or the promise of it.

The State has an interest in the life and health of all its citizens, and the law under examination was framed, not to bestow favors upon a particular profession, but to discharge one of the highest duties of a State, that of protecting its citizens from injury and harm.

It has been for ages a ruling principle of jurisprudence, "that regard for the public welfare is the highest law," and that principle is here of controlling force, for few things, if indeed any, are more important than that the health, limbs and lives of the citizens should not be entrusted to the care of persons who lack the knowledge and skill requisite to enable them to render proper medical and surgical treatment to the citizens afflicted by disease, wounds or injuries.

Judgment affirmed.

Filed Jan. 25, 1887.

No. 13,552.

McGUIRE v. WALLACE.

109	284
154	455
109	284
163	406

HABEAS CORPUS.—*Delay of Trial.*—*Application for Discharge from Custody.*—*Judgment.*—*Collateral Attack.*—Upon the hearing of an application by a prisoner, under sections 1782 and 1784, R. S. 1881, to be discharged from custody on the ground that his trial has been delayed more than two terms without his consent, if it appears that the delay has been caused by any act of the applicant, it is the duty of the court to remand him, and the judgment in that proceeding is conclusive on *habeas corpus*.

From the Fulton Circuit Court.

C. H. Blackburn, M. L. Essick and O. F. Montgomery, for appellant.

G. W. Holman, J. S. Slick and C. P. Drummond, for appellee.

McGuire v. Wallace.

MITCHELL, J.—On the 1st day of October, 1885, the grand jury of Fulton county, by an indictment duly returned, presented to the Fulton Circuit Court, then in session, that Patrick McGuire had theretofore on the 5th day of August, 1885, wilfully, purposely and with premeditated malice, feloniously killed and murdered one Michael Kain.

On the 19th day of the following November, the accused was taken into custody by Robert C. Wallace, sheriff of Fulton county, upon a warrant duly issued in that behalf, and committed to the jail of the county. He has remained in confinement continuously ever since, awaiting trial on a charge of murder in the first degree.

At the September term, 1885, that being the term at which the indictment was returned, the cause was continued by agreement.

At the succeeding February and April terms, continuances were ordered, over the defendant's objection, upon the written application of the prosecuting attorney, the ground of the application being at each term the alleged absence of one Mary E. Graul, an important witness on the State's behalf.

At the ensuing September term, the prisoner made an application to the court to be discharged, on the ground that he had been confined in the Fulton county jail without trial for a continuous period embracing more than two terms, after his presentment and arrest. His application was overruled, the cause was continued until the next term, and the defendant remanded into the custody of the sheriff.

At the succeeding term, the defendant renewed his application to be discharged, alleging as a ground therefor, that two previous continuances upon the application of the State had theretofore been granted without his consent, and that he had theretofore applied to be discharged at the preceding September term, and that such application had been refused, and the cause continued over his objection. He averred that the delay and continuances had not been caused by any act of his, nor by any person at his instance or request, and that

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at each previous term there had been sufficient time for the trial. This last application was denied, and the prisoner again remanded to the custody of the sheriff.

On the 1st day of December, 1886, the appellant filed his petition to the circuit court of Fulton county, in which he set forth substantially the facts above recited, and added that he was unlawfully imprisoned in the Fulton county jail, and restrained of his liberty by the appellee as sheriff. It is again alleged in this petition that all of the continuances above recited, except the first, were without the appellant's consent, and over his objection, and that neither of the continuances was caused by any act of his, or of any one acting for him or with his knowledge or consent, and that he had been denied a trial without cause or fault on his part, there having been at each term sufficient time to have tried him.

He prayed for the writ of *habeas corpus* against Robert C. Wallace, sheriff of Fulton county, and asked to be discharged from the alleged unlawful restraint and imprisonment.

The writ was awarded accordingly, and with the body of the prisoner, the sheriff returned the facts, in nowise substantially different from those already recited.

Upon an inspection of the record of the cause pending upon the indictment, the court gave judgment against the petitioner, and again remanded him to the custody of the sheriff. From this judgment the appeal before us is prosecuted.

On the appellant's behalf it is contended, that upon the record as stated in the petition, and substantially admitted in the sheriff's return, the prisoner was illegally restrained, and that the order made at the November term, 1886, remanding him to the custody of the sheriff, was beyond the jurisdiction of the court, and consequently void.

The insistence of the appellant is, that after two continuances have been had by the State, after the term at which an indictment has been returned, a defendant, who has not consented to such continuances, and who has been detained in jail without a trial on a criminal charge, for a continuous

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period embracing more than two terms after his arrest and commitment, may then make application to be discharged; that, upon such application, the court, if satisfied that there is evidence for the State which can not then be had, that reasonable effort has been made to procure the same, and that there is just ground to believe that such evidence may be had at the next term, may continue the cause until the next term, and that at such next term it is imperatively required that the prisoner should be either brought to trial or discharged.

This result is said to follow from a construction, or by the terms, of sections 1782 and 1784, of the code of criminal procedure, R. S. 1881.

Plausible and ingenious as the argument is in support of this view, we can not give it our approbation.

Section 1782 provides the method by which the prosecuting attorney may obtain the postponement of a criminal trial on account of the absence of any witness whose name is endorsed on the indictment. It provides further that no defendant shall be detained in jail without a trial on a criminal charge, for a continuous period embracing more than two terms after the term at which the indictment was found, "except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during said terms."

This section, as also the two sections following it, was enacted in aid of section 12 of the Bill of Rights, which provides, among other things, that justice shall be administered "completely, and without denial; speedily, and without delay."

The State may not, therefore, as was the case in those times when the liberty of the citizen was subject to the unbridled will of the crown, detain any person in prison upon any pretext whatever, without bringing him to trial as the statute prescribes. These beneficent provisions of the law were enacted to promote justice, and as a means for the vindication of the innocent and oppressed. They were not intended

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as a shield for the guilty and lawless, nor are they to be so construed as to offer inducements for those who commit crime, to enter upon active, aggressive schemes to prevent the State from obtaining the evidence thereof.

An exception was, therefore, wisely engrafted upon section 1782, the effect of which is, that when a continuance is had upon the motion of the accused, or when the delay has been caused by his own act, such continuance or such delay shall not be estimated as one of the terms embraced within the continuous period of confinement referred to in that section. In such a case, it must be considered that the prisoner has waived his constitutional and statutory right to have a speedy trial. *Butler v. State*, 97 Ind. 378, and cases cited. These exceptions are operative so long as the causes upon which they are predicated continue.

In *Commonwealth v. Haggerty*, 4 Brews. 320, a case in many respects analogous, the court said: "This defendant has voluntarily delayed his trial. He has succeeded in carrying off the commonwealth's witnesses. Possibly when he did this, he had no intention of securing the present result. Like the defendants in *Respublica v. Arnold*, 3 Yeates, 263, he doubtless supposed that if he stripped the commonwealth of her weapons, the victory would of necessity be with him. He is not the first artificer who has been caught in his own toils, and by the very means employed to defeat justice he finds himself confounded." *Clark v. Commonwealth*, 29 Pa. St. 129; *Commonwealth v. Sheriff, etc.*, 16 S. & R. 304; 1 Bishop Crim. Proc., section 951d.

Section 1784 evidently contemplates that the accused is not to be discharged, as a matter of course, after the expiration of two terms of continuous confinement, or at any other time, under the provisions of section 1782, except upon application to the court. After such confinement, that section contemplates that an application may be made for the discharge of the defendant. This application is to be made to the court in which the indictment is pending. Upon that application

it becomes a question whether the delay resulted from any of the causes which are within the exception contained in section 1782. If the delay was not occasioned by any of the matters within the exception, the court, if satisfied that there is evidence for the State, which reasonable diligence had not enabled it to procure, and that there is just ground to believe that such evidence may be procured by the next term, shall continue the case and remand the prisoner. In such a case, if the State fails to bring the accused to trial at the next term, he is entitled to his discharge. Such a discharge amounts to an acquittal of the offence. *Ex parte McGehan*, 22 Ohio St. 442; *Erwin v. State*, 29 Ohio St. 186; *Johnson v. State*, 42 Ohio St. 207.

If, however, upon such application, whenever made, the court should be satisfied that the delay was the result of one of the causes within the exception, it would be the duty of the court to continue the cause until the next term, and remand the prisoner unconditionally to await his trial. As long and as often as the State is able to make it appear that the occasion of the delay is one of the excepted causes, the application must fail.

The appellant's first application having resulted in a continuance until the next ensuing term, it is now said the only order or judgment which the court had jurisdiction to make upon the second application, was an order discharging the prisoner. As we have seen, this is a misapprehension of the statute.

The application involved an inquiry concerning questions of fact in respect to the cause of the delay in bringing on the trial. Both the State and the accused were entitled to be heard upon this investigation. The presumptions were in favor of the accused. We must presume that the court heard the evidence on both sides, and that its order and judgment was in consonance with the law and the facts. The presumptions are all in favor of the order of the court below. Its

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judgment, until it is reversed or superseded by another order, upon a subsequent application, is a valid judgment, and good authority for the retention of the prisoner in custody. *Ex parte McGehan, supra; Johnson v. State, supra.*

Whether or not an appeal may be taken from an order, such as that made, we need not now inquire. It is enough to say that both the petition and the return before us show that the appellant is in custody in pursuance of the order of a court of competent jurisdiction, such order being final so long as it is permitted to stand. When this point in the investigation is reached, all further inquiry is at an end. The prohibition contained in section 1119, R. S. 1881, forbidding an inquiry into the legality of any judgment or process, does not take from the court having jurisdiction of the writ, the power of determining whether the judgment or process emanated from a court of competent jurisdiction, and whether the court had the power to give the judgment or issue the process in question. When, however, the jurisdiction depends upon certain facts, and the court has passed upon those facts, its determination is conclusive until reversed. *People v. Liscomb*, 60 N. Y. 559 (19 Am. R. 211).

The restraint which results from the final order of a court of competent jurisdiction, can not be adjudged unlawful upon a collateral inquiry such as this. *Smith v. Hess*, 91 Ind. 424; *Holderman v. Thompson*, 105 Ind. 112; *Willis v. Bayles*, 105 Ind. 363; *Wright v. State*, 7 Ind. 324; *Wentworth v. Alexander*, 66 Ind. 39.

The learned counsel for the appellant concede that unless the judgment of the Fulton Circuit Court was void, we have no revisory or corrective jurisdiction, in a proceeding such as this. That it was not void has already been determined.

The judgment is affirmed, with costs.

Filed Jan. 25, 1887.

Wines v. Woods, Executor.

No. 11,973.

WINES v. WOODS, EXECUTOR.

109	291
158	389
158	890
158	891

DEED.—Acknowledgment.—A deed is good between the parties without a certificate of acknowledgment.

SAME.—Quitclaim.—*Notice of Prior Sale.*—*Unrecorded Deed.*—One who receives a quitclaim deed, with notice that the land has been sold, takes no title as against a prior unrecorded deed held by a good faith purchaser.

SAME.—Construction.—*Law of Place.*—The law of the place where real property is situated governs the construction and effect of a deed conveying it.

EVIDENCE.—Patent.—*Statutory Power to Convey.*—To authorize the admission in evidence of a patent issued by another State, ostensibly in pursuance of a statute authorizing a county to convey lands to the State, it must be shown that the lands described in the patent were within the provisions of the statute.

SAME.—Tax Deed.—*Law of Wisconsin.*—A tax deed under the laws of Wisconsin, being regular on its face, is presumptive evidence of the regularity of prior proceedings, and is *prima facie* proof of title in the grantee.

From the Kosciusko Circuit Court.

C. Clemans, for appellant.

W. S. Marshall, H. S. Biggs and J. W. Cook, for appellee.

ELLIOTT, C. J.—The appellee's intestate, during life, executed to the appellant a warranty deed for land in the State of Wisconsin, and the action is based upon that deed. The deed as it appears in the record is perfect, except that no certificate of acknowledgment is annexed.

The failure of the officer to annex the certificate of acknowledgment did not vitiate the instrument, for a deed is good between the parties, although not entitled to record, without an acknowledgment before an officer of its execution. *Bever v. North*, 107 Ind. 544. A *prima facie* case is made by the plaintiff, in such an action as this, when the deed is introduced, and evidence is given showing that the grantor had no title to the land which he assumed to convey.

The contention of the appellee's counsel is, that although it

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should be conceded that some errors occurred on the trial, still, there can be no reversal, because these errors did not affect the merits of the case. The ground upon which this argument is placed is, as we understand counsel, that the party in possession of the land and claiming to own it has no title, because he knew before his purchase that his grantor had no title, and with this knowledge accepted a quitclaim deed. The evidence upon this point is, that a man named Ringle wrote the appellee's intestate, Daniel Shoup, enquiring about the land, and in answer Shoup wrote him that he had sold all his land in Wisconsin. In answer to Shoup's letter Ringle wrote, in substance, as follows: "There is no deed on record from you conveying the land, you can have no trouble in giving a quitclaim deed of the land. I want the receipt for the tax of 1859. A quitclaim deed will do me no good unless I also have this receipt. There is no deed from you conveying the land on record, and I was of the opinion that the title was in you. I will, however, accept your title for what it is worth." We have no doubt that the counsel is right in assuming that Ringle bought the land with notice that Shoup had previously sold it, and that if Ringle's title depended solely on the conveyance received from Shoup, he would have no title as against the appellee. A notice to one who receives a quitclaim, that the land has been sold, is sufficient to deprive him of title as against a prior unrecorded deed held by a purchaser in good faith. But, while we thus far agree with appellee's counsel, we can not yield to the conclusion deduced, for that conclusion rests wholly upon the assumption that the only title asserted by Ringle rests on Shoup's quitclaim deed, and this assumption is unauthorized. We are, therefore, required to go further into the case.

The appellant gave in evidence an act of the Legislature of Wisconsin, passed in 1867, authorizing the county of Marathon, in which the land was situated that Shoup assumed to convey, to transfer land to the State in payment of the

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county's indebtedness. The introduction of this act was followed by the introduction of other statutory provisions in the laws of Wisconsin, and by an offer to introduce a certificate, or patent, issued under that law to Gustave Mueller on the 27th day of June, 1873. We incline to the opinion that the patent would have been admissible had the appellant proved that the land was owned by the county of Marathon, and was within the provisions of the statute, but we do not find any proof of these facts in the record; on the contrary, we find that the appellant himself introduced a deed from William C. Graves to Shoup, executed on the 16th day of April, 1858. The trial court could not, in the face of this deed, assume that the particular parcel of land was one which the county of Marathon had a right to convey under the provisions of the statute of Wisconsin. In order to prove a covenant broken, it is not enough to prove that a conveyance was ostensibly made under the provisions of a statute; it must also be proved that the parcel of land was embraced within the provisions of the law. It is important to bear in mind that the deed from Graves to Shoup was executed in 1858, fifteen years prior to the date of the certificate, or patent, issued to Mueller, and that the certificate was not issued until five years after Shoup executed the deed to the appellant. In view of these facts, it would have been unreasonable to presume that the land in question was within the statutes of Wisconsin.

It is said by the appellee's counsel, that the tax deeds offered in evidence by the appellant were properly excluded, for the reason that the statute of Wisconsin requires that tax deeds shall be executed by the county clerk, and those offered in evidence purport to have been executed by the clerk of the board of supervisors. We have examined the decisions of the Supreme Court of Wisconsin, and find that they rule this point against the appellee. The tax deed is not, under the laws of that State, vitiated by the fact that the clerk de-

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scribes himself as clerk of the board of supervisors of the county. *Scheiber v. Kaehler*, 48 Wis. 291.

The statute of Wisconsin, read in evidence, in one section provides that a tax deed "duly witnessed and acknowledged shall be presumptive evidence of the regularity of all the proceedings, from the valuation of the land by the assessor up to and including the execution of the deed." And in another section it provides that "the production of the deed, a copy of which is set forth in the complaint substantially in the form prescribed by law, or a certified copy of the record thereof, shall be presumptive evidence of an absolute title in fee simple in the grantee therein named." Wis. R. S. 1878, sections 1176, 1203.

In commenting upon this statute, it was said by the court, in *Marshall v. Benson*, 48 Wis. 558: "It is claimed that the tax deed is void upon its face because it does not show the year in which the taxes were assessed, for the non-payment of which the lot in controversy was sold and conveyed. It is a complete answer to that objection, to state that the deed is in the form then and now prescribed by statute. * * The tax deed, being regular on its face, and having been duly witnessed and acknowledged, is presumptive evidence of the regularity of all prior proceedings in respect to the taxation and sale of the lot. R. S., 377, section 1176. Its production, therefore, was *prima facie* proof of title in the grantee therein named."

The law of the place where real property is situated governs the construction and effect of a deed conveying it. *Bethell v. Bethell*, 92 Ind. 318. The validity and effect of the tax deeds offered in evidence are, therefore, to be determined by the law of Wisconsin.

The question before us is, not what must appear to constitute a valid tax title where the deed is impeached, but what is the *prima facie* effect of the deed, so that the cases of *Hilgers v. Quinney*, 51 Wis. 62, and *Smith v. Todd*, 55 Wis. 459, are not in point.

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The trial court erred in refusing to admit the tax deeds in evidence.

Judgment reversed.

Filed Jan. 26, 1887.

No. 12,374.

THE INDIANA, BLOOMINGTON AND WESTERN RAILWAY
COMPANY v. QUICK.

109	295
142	352

RAILROAD.—*Liability for Animals Killed.*—*Fence.*—*Station Grounds and Sidings.*—A railroad company is not required to fence its track at stations and sidings where freight or passengers are received or discharged, and are not liable to pay for animals which enter upon the track at such places and are killed, without negligence on the part of the company.

SAME.—The material question in such cases is the condition of the road at the place where the animals enter upon the track, and not at the place where they are killed.

PRACTICE.—*Short-Hand Reporter.*—*Long-Hand Report of Evidence.*—*Exhibits.*—*Original Papers, When Part of Record.*—*Bill of Exceptions.*—*Supreme Court.*—Original papers read in evidence, and accompanying and identified by the long-hand report of the evidence taken down in short-hand by the official reporter, will be treated in the Supreme Court as constituting a part of such report, and as properly in the record when embraced in a bill of exceptions.

TRIAL.—*Erroneous Theory.*—*Supreme Court.*—*Reversal of Judgment.*—The trial of a cause upon an erroneous theory is a mis-trial, authorizing a reversal of the judgment, except where a just conclusion has been reached upon the merits.

From the Clinton Circuit Court.

C. W. Fairbanks and W. R. Moore, for appellant.

G. W. Paul, J. E. Humphries and W. M. Reeves, for appellee.

NIBLACK, J.—This action was commenced in the Montgomery Circuit Court, and by a change of venue taken to the Clinton Circuit Court, where it was tried.

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The complaint charged, that the Indiana, Bloomington and Western Railway Company, on the 21st day of July, 1883, operated a line of railway between Indianapolis, in this State, and the city of Bloomington, in the State of Illinois, running through the county of Montgomery in the first named State; that on that day, and in said county of Montgomery, the railway company ran its locomotive and train of cars upon five horses belonging to the plaintiff Quick, and killed said horses, which were of the aggregate value of one thousand dollars; that at the place at which the horses entered upon said railway line, it was not fenced.

The railway company answered in three paragraphs:

First. In denial.

Second. That the horses mentioned in the complaint entered upon the railway track, and were killed, at a point where said track could not be fenced without injury and great inconvenience to the public, that is to say, at a point where said track crosses a highway, and where the fencing of such track would unlawfully obstruct said highway.

Third. That said horses entered upon the railway track at a point where the same could not be lawfully fenced in, that is to say, at the railway company's depot and station grounds at Wesley station in said county of Montgomery, said depot and station grounds being used to receive and discharge freight and passengers; that a fence at said point would greatly injure and embarrass the railway company and the travelling and shipping public, in the transaction of railway business at said station.

Issue, trial by a jury, verdict in favor of Quick, a new trial refused, and judgment on the verdict.

It was shown at the trial that Wesley station is a flag station upon the railway in question, on the west side of a public highway running from north to south through Montgomery county; that the passenger depot consists of a small building and a platform over sixty feet long, situate on the south side of the main track, and immediately west of the high-

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way ; that at a point near six hundred feet west of the highway a switch diverges from the south side of the main track, and runs up to within a short distance of the highway, at a point south of the depot, and about sixty-four feet distant from the main track ; that there are cattle-pens contiguous to the switch, used for shipping cattle and other animals ; that the open area between the switch and the main track in the vicinity of the depot is used in the reception and discharge of freight, and in connection with the general business of the railway company at that place ; that there is a fence on the north side of the main track, extending up to the highway ; that there is also a fence on the south side of the switch, commencing at the highway and thence running west to and alongside of the main track, but that there is no fence on the west side of the highway to prevent animals from entering either upon the switch or main track, or into the open area between the two side fences ; that there is a cattle-pit and cross-fences a short distance west of the terminus of the switch, and a trestle-bridge of considerable length several hundred feet further west ; that, on the 21st day of July, 1883, Quick, who lived about one mile and a quarter north of Wesley station, was the owner of five valuable horses, which he had on pasture, in a lot near his house ; that in the early part of that night a storm swept over the farm on which Quick resided, and blew down a part of the fence around the lot in which the horses were inclosed ; that the horses thereupon passed out of the lot through the break in the fence thus made, and went out upon the highway, to which reference has been made, in the direction of Wesley station ; that on reaching the railway the horses turned west, and went some distance down the open space between the main track and the north line of fence running parallel with it ; that soon after a freight train approached Wesley station from the east ; that after the train passed the station the horses ran on to the track in front of it, and one of them, falling into the cattle-pit, was run upon and killed ; that the remaining

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four horses leaped over the cattle-pit and continued on the track until they ran into the trestle-bridge, where they were also run upon and killed.

There was some conflict in the evidence as to the condition of the cattle-pit at the time one of the horses fell into it as stated, and as to some other kindred affairs, but as there was no question of negligence involved in the issues, which the jury were empanelled to try, such conflicting evidence had no reference to any material matter now before us.

The controlling question at the trial was, had the railway company wrongfully failed to fence in its track at the point at which the horses entered upon its right of way?

Wood, in his work on Railway Law, at page 1555, states the general rule to be that railway companies are not required to fence their depot grounds, as such a fence would be a great inconvenience to the companies as well as to the public, and that where cattle or other domestic animals, straying upon the highway, enter upon the track of a railway company over such grounds, or at any other point where the company is not obliged to erect a fence, such company can only be held liable for injuries wilfully inflicted. See, also, pages 1543 and 1564.

In this State it has been held that railway companies are not required to fence their tracks at stations and sidings where freight or passengers are received or discharged, and are not liable to pay for cattle, or other animals, which may wander upon the track at such places and be killed, without negligence on the part of such companies. This holding has been, and still is, upon the theory that when a railway track is as securely fenced as the nature of its business and public convenience will permit, it is "securely fenced in" within the meaning of section 4031, R. S. 1881, and is either expressly, or in principle, sustained by a long line of decided cases. *Indianapolis, etc., R. R. Co. v. Oestel*, 20 Ind. 231; *Jeffersonville, etc., R. R. Co. v. Beatty*, 36 Ind. 15; *Indianapolis, etc., R. R. Co. v. Christy*, 43 Ind. 143; *Pittsburgh, etc., R.*

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W. Co. v. Bowyer, 45 Ind. 496; *Ohio, etc., R. W. Co. v. Rowland*, 50 Ind. 349; *Indianapolis, etc., R. W. Co. v. Crandall*, 58 Ind. 365; *Cincinnati, etc., R. R. Co. v. Wood*, 82 Ind. 593; *Fort Wayne, etc., R. R. Co. v. Herbold*, 99 Ind. 91.

The doctrine, which the foregoing cases are cited as sustaining, is applicable to the essential facts of this case, and, consequently, a new trial ought to have been allowed for want of sufficient evidence to support the verdict.

The evidence given in this cause was taken down by a short-hand reporter, and a long-hand and duly certified report of the evidence so given was made by the reporter and filed with the clerk of the court below. A map of Wesley station and its immediate vicinity and some other papers in writing, which were put in evidence, were attached to this long-hand report, and are referred to and identified by it as exhibits which constitute a part of the evidence. This original long-hand report of the evidence, with the exhibits attached, has been embraced in, and certified to us as a part of, the bill of exceptions.

The point is made that the bill of exceptions shows upon its face that it does not contain all the evidence given in the cause, because the accompanying exhibits are not copied into the long-hand report of the evidence, and because original papers can not be certified to us as a part of the transcript of the proceedings below.

It is true, that, under our former practice, and as a general rule now, a paper read in evidence must be copied into the transcript of the bill of exceptions at some appropriate place. It is also true, that, as a general rule, an original paper can not be certified or transmitted as a part of the transcript of the proceedings from which an appeal is prosecuted to this court. But the long-hand report of the evidence before us is not, and does not purport to be, a transcript of the evidence introduced at the trial. It is, under section 4010, R. S. 1881, an original manuscript or document incorporated in the bill of exceptions. It follows that original papers read

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in evidence, and accompanying and properly identified by such long-hand report, may be treated in this court as embraced within, and constituting a part of it. The exhibits in question are, consequently, before us as a part of the evidence, and hence we have no reason for concluding that the bill of exceptions does not contain all the evidence given in the cause. *Marshall v. State, ex rel.*, 107 Ind. 173; *Wagoner v. Wilson*, 108 Ind. 210.

The judgment is reversed, with costs; and the cause is remanded for a new trial.

Filed Jan. 11, 1887.

ON PETITION FOR A REHEARING.

NIBLACK, J.—A petition for a rehearing has been filed in this case, and in a brief accompanying it, bitter complaint is made that we did not at the former hearing consider the cause upon the theory upon which it was tried in the court below, accompanied with an intimation that we certainly did not read the evidence given at the trial with as much care as it was our duty to have done in justice to the appellee.

We, nevertheless, did read the evidence very carefully, and, although we did not deem it then necessary to say so, we came to the conclusion that the case had been tried upon an utterly erroneous theory, and that the judgment might have been rightfully reversed for that reason alone.

The averment of the complaint was, as has been already stated, that the horses *entered* upon the railway track at a point at which it was not securely fenced, and the evidence showed beyond all controversy that they entered the track, or, which was, in legal contemplation, the same thing, into an open area adjoining the track, at Wesley station, near, if not quite, a half a mile east of where four of the horses were killed, and a very material distance east of the place at which the other horse ran into the cattle-pit and was also killed.

The real condition of the track with reference to fencing,

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at Wesley station, became, therefore, under the issues and the evidence, the controlling question at the trial.

In cases like this, it is the condition of the road at the place at which the animals entered upon the track, and not where they were killed, which becomes the material question for decision. *Toledo, etc., R. W. Co. v. Stevens*, 63 Ind. 337; *Wabash, etc., R. W. Co. v. Forshee*, 77 Ind. 158; *Louisville, etc., R. W. Co. v. Porter*, 97 Ind. 267; *Louisville, etc., R. W. Co. v. Thomas*, 106 Ind. 10.

It is true that much of the evidence introduced at the trial had reference to the condition of the cattle-pit into which one of the horses fell, and over which the others leaped, and counsel, during the progress of the trial, seemed to regard that as the pivotal question in the cause, but, for the reasons given, it was a merely incidental and immaterial question.

After the horses got upon the track in front of the locomotive, they would probably have been in less danger if there had been no cattle-pit, over which they were compelled to pass. The more impassable the cattle-pit may have been, the greater obstruction it would have been to the horses in their effort to escape from the train. However securely constructed the cattle-pit in question may have been, and however well kept in repair, it would have afforded the railway company no defence if its road ought to have been fenced where the horses entered upon it, that is, at Wesley station.

If counsel choose, and are permitted by the *nisi prius* court, to try a cause upon a theory outside of any issue formed by the pleadings, it does not follow that the cause must be reviewed in this court upon the same theory; on the contrary, such a trial is mis-trial, and can not be sustained by this court, except, perhaps, in a case in which a palpably just conclusion has been reached upon the real merits of the cause.

The petition for a rehearing is overruled.

Filed Jan. 26, 1887.

Latta et al. v. Miller, Administrator.

No. 12,141.

LATTA ET AL. v. MILLER, ADMINISTRATOR.

PLEADING.—*Complaint.*—*Anticipated Defence.*—*Promissory Note.*—*Release of Maker Endorsed Thereon.*—Where a complaint counts upon a promissory note, and the anticipated defence to the note is a written release of the maker so endorsed on the note as to become in some sense a part of the cause of action, the plaintiff may state in the complaint the anticipated defence and the facts intended to show that it is invalid; but if the facts stated in avoidance of the defence are not sufficient for that purpose, the complaint is bad on demurrer.

ADMINISTRATOR.—*Power to Release Maker of Promissory Note.*—Under the law of this State an administrator has power, in good faith and upon a sufficient consideration, to release one of the makers of a promissory note, executed to him in his fiduciary capacity, from liability for the balance of the note remaining unpaid.

From the Elkhart Circuit Court.

J. H. Baker and F. E. Baker, for appellants.

R. M. Johnson, E. G. Herr, H. D. Wilson and W. J. Davis, for appellee.

HOWK, J.—In this case, the appellee Miller, administrator of the estate of Jacob Beckner, deceased, sued the appellants, Latta and Sparklin, in a complaint of four paragraphs, upon a promissory note, of which the following is a copy:

“\$790. GOSHEN, IND., April 27th, 1881.

“Fourteen months after date, we promise to pay to the order of William C. Miller, guardian of J. Beckner, seven hundred and ninety dollars, at our office, for value received, without any relief whatever from valuation or appraisement laws, with seven per cent. interest from date until paid, and attorneys’ fees. (Signed) LATTA & SPARKLIN.”

The appellants severed in their defence, and each answered separately in four special paragraphs; to each of which paragraphs the appellee’s demurrer, for the alleged want of facts, was sustained by the court. The appellants severally declined to amend or plead further, and judgment was rendered

109	302
183	110

109	302
180	386

109	302
162	415

109	302
169	182
170	354

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against them, in appellee's favor, for the amount found due on their note, and the costs of suit.

In this court, the appellants have separately assigned errors, which call in question the decisions of the circuit court, (1) in overruling their separate demurrers to each paragraph, except the third, of appellee's complaint, and (2) in sustaining appellee's demurrers to each paragraph of their separate answers.

The cause was submitted in this court by agreement, on the 3d day of February, 1885. It does not appear that any brief or argument has ever been filed here by or on behalf of the appellant, Sparklin; and, therefore, this appeal must be dismissed as to him, at his costs, under rule 14 of the rules of this court, for the want of such brief. This leaves for our consideration and decision such questions only as are presented by the errors assigned by the appellant, Latta; and these are the only questions discussed by counsel, in their briefs of this cause.

On behalf of appellant, Latta, it is first insisted that the court below erred in overruling his demurrer to the first paragraph of appellee's complaint. In this first paragraph, the appellee alleged that, on the 27th day of April, 1881, he was the legal guardian of the person and estate of one Jacob Beckner, then an inhabitant of Elkhart county, and a person of unsound mind; that, on the day last named, the appellants were partners in business under the firm name of Latta & Sparklin; that, on said day, at the instance and request of the appellants, the appellee, as such guardian, loaned them, of the money and property of said Jacob Beckner, under guardianship as aforesaid, the sum of \$790, and the appellants, on the same day, received such money as partners and used the same in their partnership business, and evidenced such loan by their promissory note, setting out the same note whereof a copy is heretofore given in this opinion; that at the time such money was so loaned to appellants, they well knew that the money was trust funds belonging to the estate

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of said Jacob Beckner; that, after the execution of such note, to wit, on the 14th day of October, 1881, said Jacob Beckner died at Elkhart county, and afterwards, on October 20th, 1881, the appellee was appointed and qualified, and was then acting, as administrator of such decedent's estate; that afterwards, and after the 2d day of April, 1882, the appellants, Latta and Sparklin, dissolved their copartnership, without having paid or arranged for the payment of their aforesaid note; that, on April 2d, 1882, the appellant Latta, then and there well knowing that appellee was the administrator of such decedent's estate, and that the debt evidenced by such note was of the trust moneys of such estate, and not otherwise, proposed to appellee that he would then pay on such note an amount equal to the one-half of the principal and of the accrued interest thereof, and then and there asked appellee to receive the same; that appellee accepted such proposition and received such money, without any consideration whatever therefor and solely to accommodate appellant Latta (*except* the payment of the one-half of the amount then due on such note); that appellant Latta, on April 2d, 1882, paid appellee the sum of \$422.18, of the trust funds belonging to such estate, and the appellee then and there, in his individual capacity and not as administrator, receipted to appellant Latta, for the sum so paid, by signing his name to a writing endorsed on such note, in the words and figures following, to wit:

“Having received one-half of the value of this note from M. M. Latta, I hereby release all claim on him for the balance. April 2d, 1882. (Signed) WILLIAM C. MILLER.”

But with the intent and “distinct understanding by each of these parties,” that said Sparklin should in no manner thereby be released or discharged from his liability on said note; and the appellee averred that the residue of such note was then due and owing to him, as administrator. Wherefore, etc.

In each of the second and fourth paragraphs of his com-

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plaint, appellee sued appellants for the recovery of the same sum of money, belonging, as alleged, to the "trust funds" of the estate of appellee's intestate, mentioned in the promissory note declared upon in the first paragraph of such complaint. The second paragraph of complaint contained no reference whatever to any promissory note; but in such paragraph, appellee said that on the 27th day of April, 1881, he was the lawful guardian of the person and estate of one Jacob Beckner, who was then and there a person of unsound mind and an inhabitant of Elkhart county; that on said day appellee, as such guardian, loaned appellants, then partners doing business in such county, under the firm name of Latta & Sparklin, \$790 of the funds and property of the estate of said Jacob Beckner; that appellants then and there well knew that the money, so loaned to them, was of the funds and money of said estate; that afterwards, on October 14th, 1881, said Jacob Beckner died at such county, and appellee was administrator of such decedent's estate; and that the sum of money so loaned appellants, "trust funds as aforesaid," with interest from April 27th, 1881, was then due and owing appellee from the appellants, and wholly unpaid. Wherefore, etc.

In the fourth paragraph of his complaint, appellee again declared upon the promissory note, heretofore copied in this opinion, and stated substantially the same facts in relation to the note and the endorsement thereon, as were stated in the first paragraph of complaint, the substance of which we have already given. The fourth paragraph covers nearly three times as many pages of manuscript as the first paragraph of complaint, and this constitutes the principal difference between the two paragraphs. The material facts of appellee's cause of action, as stated in the fourth paragraph of his complaint, are concealed and almost wholly lost in a dense mass of unnecessary verbiage. Such pleading is a proper subject of criticism and, speaking mildly, can not be commended.

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Appellant's learned counsel concede, in argument, that the second paragraph of appellee's complaint is "probably good;" but they vigorously assail the first and fourth paragraphs of such complaint, upon the ground that neither of these paragraphs stated facts sufficient to constitute a cause of action against the appellant Latta.

Of the first paragraph of complaint counsel say: "In addition to the averments as to the execution and non-payment of the note, the paragraph sets up a valid release of all liability thereon. Such pleading ought not to be tolerated by the courts, as it violates the fundamental principles of good pleading. It attempts to embody in the complaint a cause of action, an anticipated defence, and matter in avoidance of such defence." What is thus said by counsel, in relation to the first paragraph, might be equally as well said of and concerning the fourth paragraph of complaint.

Doubtless, it is true as a general rule, that good pleading requires, under our civil code, that the complaint or paragraph thereof shall contain no more than "A statement of the facts constituting the cause of action, in plain and concise language, without repetition." Section 338, R. S. 1881. But, like other general rules, this one has its exceptions; and the case in hand falls within the exceptions to the general rules of good pleading. Where, as in this case, the complaint or paragraph thereof counts upon a promissory note, and the anticipated defence to the suit is the written release of the maker from all liability on such note, by the payee and holder thereof, so endorsed on the note as to become in some sense, and to some extent, a part of the cause of action, it seems to us that the plaintiff can not well avoid the statement, in such complaint or paragraph, of such anticipated defence, and of the facts which show, as claimed by him, that such defence was and is invalid and void. It is true, no doubt, as appellant's counsel insist, that where the complaint or paragraph thereof, after stating the plaintiff's cause of action, sets up an anticipated defence thereto, and then attempts

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to avoid or defeat such defence by the statement of alleged facts in relation thereto, if the facts thus stated are not sufficient to avoid or defeat such anticipated defence, the complaint or paragraph thereof must be held bad on demurrer thereto for the want of facts. This must be so, in the nature of things, because the anticipated defence, if not avoided, constitutes a complete bar to the cause of action stated in the complaint or paragraph thereof.

Appellant's counsel then discuss, with much learning and ability, (1) the alleged sufficiency of the anticipated defence to defeat or bar the cause of action stated in the first and fourth paragraphs of the complaint, and (2) the alleged insufficiency of the matters in avoidance pleaded by appellee, in these two paragraphs of complaint, to avoid or defeat such anticipated defence.

The controlling questions in the case, however, are presented fairly for both parties, as it seems to us, by the errors assigned by appellant Latta, upon the decisions of the court, in sustaining appellee's demurrers to each of the four paragraphs of his separate answer. The first paragraph of such answer was pleaded to the first, second and fourth paragraphs of complaint, and therein appellant Latta admitted the execution of the note in suit, as alleged in such complaint; but appellant averred that appellee ought not further to have an action against him, for that on April 21st, 1882, and about two months before the maturity of such note, the appellee, having doubt about appellant's ability to pay such note, or any part thereof, when it should fall due, and there being, in fact, great doubt whether appellant would have sufficient property, subject to execution, when the note should become due, to pay such debt, in consideration that he agreed, at appellee's request, to procure the sum of \$422.18, which he did not then have, and to pay to appellee, as such administrator, such sum of money, being the one-half of the principal and accrued interest on such note, before the same fell due, did, as such administrator, without any fraud or misrepresentation

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or undue advantage on appellant's part, agree to release appellant from all liability on said note and indebtedness, and to endorse such release on such note ; and appellant said that on the faith of such agreement, he procured said sum of money, which he did not then have, and then and there paid the same to appellee, as such administrator, who then and there, without any fraud on appellant's part, accepted the same in full payment and release of appellant's liability on said note and indebtedness, and then and there executed his release on the back of note, as follows :

" Having received one-half the value of this note from M. M. Latta, I hereby release all claim on him for the balance. \$422.18. April 21st, 1882.

(Signed) " WILLIAM C. MILLER."

And appellant said, that, in consideration of said agreement and release, he procured and paid to appellee, as such administrator, said sum of \$422.18, without any knowledge on his part that his co-defendant, Sparklin, might be thereby released from such note, which sum of money appellee accepted in full payment and release of appellant's liability on said note and indebtedness, and which sum appellee still retained.

The second paragraph of Latta's separate answer was addressed to the second paragraph only of appellee's complaint, and therein he admitted that appellee, at the time stated in the second paragraph of complaint, loaned the sum of money therein mentioned to the firm of Latta & Sparklin ; but appellant averred that at appellee's request, on the day such loan was made, and as a part of its terms, Latta & Sparklin executed to appellee, to evidence such indebtedness, their note in words and figures following: (Setting out the note, a copy of which is heretofore given in this opinion). And appellant averred that the sum of \$790, mentioned in such note, was the same money mentioned in the second paragraph of appellee's complaint. Appellant then alleged, in such second paragraph of his answer, substantially the same facts, in almost

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the same language, and set out the same written release of all claim on him for the balance of the note, which he had pleaded in the first paragraph of his answer.

The third paragraph of Latta's separate answer was an answer to the first and fourth paragraphs of appellee's complaint, and therein Latta admitted the execution of the note sued on, but he said that appellee ought not further to have his action thereon against him, for that on April 21st, 1882, and about two months before such note became due, appellee, knowing that the makers of such note, who had been at a previous time partners in the practice of medicine, had dissolved their partnership, and that they had each agreed to assume and pay the one-half of all their joint obligations, requested appellant Latta to pay him the one-half of the principal and interest then accrued, on such note, which then amounted to \$422.18, and the appellee then and there, in consideration that Latta, who did not then and there have that amount of money, would procure and pay him that sum, agreed with Latta to accept such sum in full payment and release of all his liability on such note, and to look to Sparklin alone for the payment of the balance of the money mentioned in said note; that Latta then and there accepted and agreed to the aforesaid promises and agreements of appellee, and in consideration thereof, and in reliance thereon, he at great inconvenience borrowed such sum of \$422.18, and then and there paid the same to appellee, as such administrator, who then and there, in pursuance of said agreement, and in consideration that Latta would and did pay him, as such administrator, such sum of \$422.18 on such note, about two months before the same became due, executed upon the back of such note a full release and discharge of Latta from all liability on such note, which release still remained in full force, and was in the words and figures following: (Setting out the same written release, heretofore copied in this opinion).

And appellant Latta denied that he was ever the family physician of appellee, and he denied each and every charge

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of fraud, misrepresentation or undue advantage, in procuring said release, charged in such paragraphs of appellee's complaint.

The fourth paragraph of Latta's answer was addressed to the fourth paragraph only of appellee's complaint, and contained substantially the same admissions, averments of facts and denials, as the third paragraph of such answer.

It is claimed on behalf of the appellant Latta, and correctly so we think, that the rulings of the court below upon the several paragraphs of his answer, and the errors assigned here upon such rulings, fairly present for our decision the question of the validity and binding force of appellee's written release of Latta from all liability on the note in suit. In other words, upon the facts stated in these paragraphs of answer, had the appellee as administrator power and authority, under our law, in good faith and upon a sufficient consideration, to release Latta from all claim on him for the balance of the note in suit? We are of opinion that this question must be answered in the affirmative.

In *Underwood v. Sample*, 70 Ind. 446, the appellant, as executrix of a decedent's will, had sued appellee, Sample, and one McBride upon a promissory note, executed by them to the decedent in his lifetime. Sample had answered specially to the effect that McBride was principal, and he was surety only, in the note sued on; that, without his knowledge or consent, the executrix had agreed with McBride, the principal in such note, upon a new and valuable consideration, to extend the time of payment of the note for five years after its maturity. Upon appeal, it was objected to the sufficiency of Sample's special answer, that appellant had no power, as executrix, to make a contract for the extension of the time of payment of the note. But it was held by this court, that an executor has power to extend the time of payment of a debt due the estate of his testator. It was there said: "The executor has, in this State, a general, and in many respects an absolute, power over the debts due the estate of his tes-

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tator. When done without fraud or collusion, he may assign or release such debts and may exercise general acts of ownership over them in regard to their security or collection, subject only to his liability on his bond for any loss which may occur by reason of his mismanagement of such debts."

"The common law of England, and statutes of the British Parliament made in aid thereof prior to the fourth year of the reign of James the I." (A. D. 1607), (with certain exceptions), which are of a general nature, not local to that kingdom, and not inconsistent with our Constitutions and statutes, Federal and State, constitute now, as they have always constituted, a very large part of the law of this State. Section 236, R. S. 1881; *Stevenson v. Cloud*, 5 Blackf. 92; *Lafayette, etc., R. R. Co. v. Shriner*, 6 Ind. 141; *Dawson v. Coffman*, 28 Ind. 220.

In *Weyer v. Second Nat'l Bank*, 57 Ind. 198, this court said: "At common law, an executor or administrator had the same property in, and, of course, the same powers over, the personal effects or estate of his decedent, that such decedent had at and before his death. In *Whale v. Booth*, 4 T. R. 625, note *a*, Lord MANSFIELD, C. J., said: 'The general rule both of law and equity is clear, that an executor may dispose of the assets of the testator; that over them he has absolute power; and that they can not be followed by the testator's creditors.'"

It will be understood, of course, that an administrator has the same property in, and the same powers over, the personal estate of his decedent, as an executor; because the law is, that after administration has been granted, "the power of an administrator is equal to, and with, the power of an executor." 2 Williams Exec., 6th Am. ed., p. 992.

The common law rights and powers of an executor or administrator, over promissory notes, bills of exchange or other evidences of debt, belonging to the decedent's estate, so far as we are advised, have never been changed or restricted even by statute in this State, but have often been recognized

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in the decisions of this court. Thus, we have often held that an executor or administrator may transfer, by his endorsement, promissory notes payable to his decedent, so as to vest the absolute title thereto in his assignee. *Thomas v. Reister*, 3 Ind. 369; *Hamrick v. Craven*, 39 Ind. 241; *Thomasson v. Brown*, 43 Ind. 203; *Krutz v. Stewart*, 76 Ind. 9; *Rogers v. Zook*, 86 Ind. 237.

Indeed, the only restraint upon the common law rights and powers of an executor or administrator, in or over promissory notes and other evidences of debt, belonging to the decedent's estate, is imposed not by statute in this State, but by the decisions of this court. Thus, where an executor or administrator barter and assigns promissory notes belonging to his decedent's estate, for his own private purposes, to an assignee with notice, we have held, and correctly so we think, that such transfer of the notes was simply a *devastavit* of the estate; and that any one who, with notice, participated in such *devastavit*, would be liable for the full amount to any creditor, subsequent administrator, or heir at law, of the decedent. *Thomasson v. Brown*, *supra*; *Fleece v. Jones*, 71 Ind. 340; *Rogers v. Zook*, *supra*.

In the case in hand, it is not claimed on either side that the transaction between appellee and appellant, which resulted in the release of Latta from liability for the balance of the note in suit, was a *devastavit* of the estate of appellee's intestate. Indeed, so far as the record shows, appellee, in good faith and for a valuable consideration, released appellant Latta from further liability on the note in suit. Appellee, as administrator, under the law of this State, had full power and authority to execute the release; and such release, upon the facts stated in each paragraph of Latta's answer, constituted a valid and sufficient defence in bar of appellee's action.

The court clearly erred, we think, in sustaining appellee's demurrers to each and every paragraph of Latta's answer.

The judgment against Latta is reversed, with costs, and

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the cause is remanded with instructions to overrule the demurrers to the several paragraphs of Latta's answer, and for further proceedings in accordance with this opinion.

MITCHELL, J., took no part in the decision of this cause.

Filed Jan. 27, 1887.

No. 12,825.

WOLKE ET AL. v. KUHNE.

PROMISSORY NOTE.—*Capacity of Payee to Endorse.*—*Warranty.*—*Estoppel.*—

The maker of a note negotiable under the law merchant warrants the capacity of the payee to transfer it in the usual course of business, and can not, by asserting the contrary, defeat it in the hands of a good-faith holder.

From the Allen Superior Court.

W. G. Colerick, H. Colerick, W. S. Oppenheimer and P. B. Colerick, for appellants.

T. E. Ellison, for appellee.

ELLIOTT, C. J.—Wolke, as principal, and Trentman, as surety, executed the promissory note in suit, payable to the order of "T. W. Woollen, Attorney General."

There is evidence very satisfactorily showing that Kuhne became the owner of the note in good faith, for value, and without notice of any defence, before its maturity.

We incline to the opinion that the words added to the name of the payee are merely descriptive of the person, and can not, in any event, trammel the rights of a *bona fide* holder. *Jackson School Tp. v. Farlow*, 75 Ind. 118; *Hayes v. Matthews*, 63 Ind. 412; *Hays v. Crutcher*, 54 Ind. 260; *Means v. Swormstedt*, 32 Ind. 87 (2 Am. R. 330); *Kenyon v. Williams*, 19 Ind. 44; *Hobbs v. Cowden*, 20 Ind. 310; *Shepherd v. Evans*, 9 Ind. 260.

Wolke *et al.* v. Kuhne.

We are clearly of the opinion that the appellants are not in a situation to dispute the authority of the payee to accept and transfer the note executed by them. Whatever may be the right of the State, it is certain these appellants can not successfully present the question of the authority of T. W. Woollen to take or transfer the note executed to him. That is a question between him and the State, with which these appellants have no concern, for they have executed a commercial note, fair on its face and complete in all its parts, and they can not defeat it in the hands of a *bona fide* holder. *New v. Walker*, 108 Ind. 365.

The makers of a note negotiable under the law merchant warrant the capacity of the payee to transfer it in the usual course of business. Mr. Bigelow thus states the rule: "The execution of a negotiable note is a warranty of the *existing* capacity of the payee to endorse the paper." Bigelow Estop. 512. Another author says: "The person to whose order a bill or note is made payable, is generally vested with the right to transfer the same by endorsement; and it does not lie with the maker or acceptor to dispute the power of the payee to endorse and transfer the instrument. By making the note or accepting the bill, and issuing it, the maker and acceptor assert to the world the competency of the payee to negotiate and assign the paper; and they are not afterwards permitted to gainsay the assertion so made." Edwards Bills and Notes, section 363. An English author, whose work has long been recognized as authority, in speaking of the acceptor of a bill, says: "He moreover admits, and so does the maker of a promissory note, the then capacity of the payee, to whose order the bill or note is made payable, to endorse." Byles Bills, 202.

This well established principle rules the case against the appellants. The decision in *Union School Tp. v. First Nat'l Bank*, 102 Ind. 464, expresses the law correctly upon the case then before the court, but it has no application to such a case as this.

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The only error in the instructions is, that they are more favorable to the appellants than the law warrants.

We are inclined to think that the objection of the appellee, that, as the complaint on which the case was tried is not in the record, no question is properly presented, is well taken, but, as the merits of the case are plain and decisive, we have not put our decision upon that objection.

Judgment affirmed.

Filed Jan. 27, 1887.

No. 11,520.

HULL v. LOUTH, GUARDIAN, ET AL.

DEED.—*Insanity of Grantor.*—*Disaffirmance.*—*Restitution.*—E., a person of unsound mind, incapable of comprehending the nature of the transaction, without any valuable consideration, conveyed her real estate to T. by deed, which was duly recorded. To secure a loan of money with which to pay off delinquent taxes and other liens against the land, T. executed a mortgage thereon to H., who had no knowledge of E.'s unsoundness of mind, but advanced the money and accepted the security in good faith, relying on the public records. E. received no benefit from the money, either in person or estate. In a suit by H. to foreclose the mortgage,

Held, that although there was no disaffirmance by E. or her guardian, and no offer to make restitution of the money advanced by H., the deed was at least voidable, and that H. could not recover, as against E., who was entitled to have her title quieted as against him, by cross complaint.

SAME.—*Person of Unsound Mind.*—Where a person of unsound mind is brought into court as a defendant, to answer as to any interest he may have in real estate theretofore conveyed by him, the filing of an answer and cross complaint by the guardian of such person is a sufficient disaffirmance of such conveyance.

SAME.—*Consideration.*—*Insanity of Grantor.*—*Good Faith.*—A person holding land, for which he has paid no consideration, can not defeat an action to set aside his deed on account of the insanity of his grantor, by showing that the grantor had the appearance of being mentally sound, and that he accepted the deed without knowledge of the insanity of such grantor.

109	315
137	445
109	315
128	205
126	358
109	315
130	166
109	315
131	422
109	315
124	604
125	603
125	606
109	315
137	168
137	636
109	315
140	297
141	609
109	315
145	183
109	315
143	176
109	315
154	873
109	315
159	242

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or undue advantage on appellant's part, agree to release appellant from all liability on said note and indebtedness, and to endorse such release on such note; and appellant said that on the faith of such agreement, he procured said sum of money, which he did not then have, and then and there paid the same to appellee, as such administrator, who then and there, without any fraud on appellant's part, accepted the same in full payment and release of appellant's liability on said note and indebtedness, and then and there executed his release on the back of note, as follows:

"Having received one-half the value of this note from M. M. Latta, I hereby release all claim on him for the balance. \$422.18. April 21st, 1882.

(Signed) "WILLIAM C. MILLER."

And appellant said, that, in consideration of said agreement and release, he procured and paid to appellee, as such administrator, said sum of \$422.18, without any knowledge on his part that his co-defendant, Sparklin, might be thereby released from such note, which sum of money appellee accepted in full payment and release of appellant's liability on said note and indebtedness, and which sum appellee still retained.

The second paragraph of Latta's separate answer was addressed to the second paragraph only of appellee's complaint, and therein he admitted that appellee, at the time stated in the second paragraph of complaint, loaned the sum of money therein mentioned to the firm of Latta & Sparklin; but appellant averred that at appellee's request, on the day such loan was made, and as a part of its terms, Latta & Sparklin executed to appellee, to evidence such indebtedness, their note in words and figures following: (Setting out the note, a copy of which is heretofore given in this opinion). And appellant averred that the sum of \$790, mentioned in such note, was the same money mentioned in the second paragraph of appellee's complaint. Appellant then alleged, in such second paragraph of his answer, substantially the same facts, in almost

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the same language, and set out the same written release of all claim on him for the balance of the note, which he had pleaded in the first paragraph of his answer.

The third paragraph of Latta's separate answer was an answer to the first and fourth paragraphs of appellee's complaint, and therein Latta admitted the execution of the note sued on, but he said that appellee ought not further to have his action thereon against him, for that on April 21st, 1882, and about two months before such note became due, appellee, knowing that the makers of such note, who had been at a previous time partners in the practice of medicine, had dissolved their partnership, and that they had each agreed to assume and pay the one-half of all their joint obligations, requested appellant Latta to pay him the one-half of the principal and interest then accrued, on such note, which then amounted to \$422.18, and the appellee then and there, in consideration that Latta, who did not then and there have that amount of money, would procure and pay him that sum, agreed with Latta to accept such sum in full payment and release of all his liability on such note, and to look to Sparklin alone for the payment of the balance of the money mentioned in said note; that Latta then and there accepted and agreed to the aforesaid promises and agreements of appellee, and in consideration thereof, and in reliance thereon, he at great inconvenience borrowed such sum of \$422.18, and then and there paid the same to appellee, as such administrator, who then and there, in pursuance of said agreement, and in consideration that Latta would and did pay him, as such administrator, such sum of \$422.18 on such note, about two months before the same became due, executed upon the back of such note a full release and discharge of Latta from all liability on such note, which release still remained in full force, and was in the words and figures following: (Setting out the same written release, heretofore copied in this opinion).

And appellant Latta denied that he was ever the family physician of appellee, and he denied each and every charge

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from Emma J. to Henry C., be declared of no effect, and that her title to the land be quieted as against all of the other parties to the suit.

Appellant answered the cross complaint, in substance, that in 1871, Emma J., by a warranty deed, conveyed the land to Henry C. Taylor, and that the deed was properly recorded in the same month; that in 1874, Henry C., then living on the land, executed a mortgage thereon to one Holmes, to secure a loan of \$500, and at the same time executed another mortgage thereon to one Jones, to secure \$126, which mortgages were duly recorded; that the note and mortgage in suit were given to secure a loan of money to pay off the two prior mortgages, and to pay delinquent taxes against the land; that appellant loaned the money to Henry C. in good faith, relying wholly upon the public records of deeds and mortgages, and without any knowledge that Emma J. was suspected of being of unsound mind; that up to the time when she executed the deed to her son, Henry C., there had been no question made by any one as to the soundness of her mind, and that she had managed her affairs without any appearance of mental incapacity.

The third paragraph of appellant's answer to the cross complaint was, in substance, that when he loaned the money to Henry C., and accepted the note and mortgage in suit, and before Emma J. had been adjudged of unsound mind, Henry C. was in possession of the land, using and cultivating it with her knowledge and consent; that appellant made the loan to Henry C., and paid to him the amount of the note and mortgage, without any knowledge that Emma J. claimed to have any interest in the land, or that she was of unsound mind, and without any fraud, or undue advantage, and for the purpose of enabling Henry C. to pay delinquent taxes, and other encumbrances upon the land, created by him in the support of his mother, Emma J., and himself, while living on the land.

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Appellant's replies to the guardian's answer are substantially the same as his answers to the cross complaint.

As will be observed, these averments in the guardian's answer and cross complaint are not denied in or by appellant's answers and replies, viz.: The conveyance from Emma J. to Henry C. was without any valuable consideration. At the time of the conveyance, she was of unsound mind, incapable of making or understanding the deed, or of managing her estate.

She was adjudged to be of unsound mind, and placed under guardianship after this suit was commenced.

The demurrer to appellant's answers and replies admitted as true the averments, that the deeds and mortgages therein mentioned were recorded before appellant made the loan to, and accepted the mortgage from, Henry C.; that appellant loaned to Henry C., while he was living on the land, \$800, to enable him to pay off the prior mortgages placed on the land by him, and to enable him to pay delinquent taxes against the land; that up to the time Emma J. executed the deed to Henry C., she managed her estate without any appearance of mental incapacity, and that up to that time no question had been made by any one as to the soundness of her mind; that appellant made the loan upon the faith of the public records of deeds and mortgages, in good faith, and without any knowledge that Emma J. was of unsound mind. It is not averred, as will be observed, in the answer and cross complaint by the guardian, that appellant knew that the deed from Emma J. to Henry C. was without any valuable consideration; nor is it averred in appellant's answers and replies, that he did not have such knowledge. It is not averred in his answers and replies, that the money received from him was actually applied by Henry C. in payment of delinquent taxes and the prior mortgages; nor is it averred that the delinquent taxes accrued before the execution of the deed to Henry C. It is not averred in the guardian's answer and cross complaint, that Henry C. had knowledge of the un-

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soundness of the mind of Emma J. at the time he accepted the deed from her. Neither is it averred in appellant's answers and replies, that he did not have such knowledge.

Whether the deed from Emma J. to Henry C. be regarded as void, or as voidable, it must be clear, upon the undisputed facts stated in the pleadings, that, as between them, her guardian has the right, in this action, to have the deed set aside, and the title to the land quieted in her.

It can not be said, that as between them, she was bound to make restitution, and thus place the parties *in statu quo*, because she received nothing for the conveyance, nor did Henry C. suffer any loss or inconvenience thereby.

It is averred in appellant's answers and replies, that he loaned the money to Henry C. to enable him to pay off the prior mortgages and delinquent taxes against the land. The prior mortgages were put upon the land by Henry C. after he received the deed from Emma J., and it is in no way made to appear by the averments in any of the pleadings, that either of those mortgages was given to secure a debt or debts due from her, or that she received any of the money borrowed by Henry C., to secure the payment of which one of the mortgages was given by him, or that any of it was used or applied in any way for her benefit.

It is not averred in any of the pleadings, that the delinquent taxes accrued prior to her deed to Henry C.; nor is it averred in any of the pleadings that the money received from appellant by Henry C. was applied by him in payment of the prior mortgages or the delinquent taxes.

In short, there is nothing in appellant's answers and replies to meet the averments in the guardian's answer and cross complaint, that Emma J. received nothing for the conveyance from her to Henry C. *Northwestern Mut. F. Ins. Co. v. Blankenship*, 94 Ind. 535 (48 Am. R. 185). Nor can it be said, that as a condition precedent to the setting aside of the deed, she, or her guardian, must have disaffirmed the deed. As her mental incapacity has been continuous, she could not

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disaffirm, if that were necessary ; and as her guardian was not appointed until after the suit was commenced, he could not have disaffirmed the deed before the bringing of the suit.

The filing of the answer and cross complaint by the guardian was a sufficient disaffirmance on his part, as the representative of Emma J. When persons of unsound mind are brought into court by a suit to enforce contracts made by them, it will not do to hold that they may not, by their guardian, make the defence that, when the contract was made, they were of unsound mind. *Northwestern Mut. F. Ins. Co. v. Blankenship, supra.* See, also, *Copenrath v. Kienby*, 83 Ind. 18; *Musselman v. Cravens*, 47 Ind. 1.

It is averred in appellant's answers and replies, that up to the time when Emma J. made the deed to Henry C., she had managed her business without any appearance of incapacity on her part, but it is nowhere averred, that at the time the deed was executed, she was not of unsound mind, and incapable of understanding the deed, or its effect. Nor is it anywhere averred that at the time the deed was made, Henry C. did not know that she was of unsound mind, and wholly incapable of comprehending the force and effect of the deed. But if we should assume that Henry C. did not know of her mental infirmity when he accepted the deed, it would not alter the case as to him. A person, holding land for which he has paid no consideration, can not defeat an action to set aside his deed on account of the insanity of his grantor, by simply showing that the grantor had the appearance of being mentally sound, and that he accepted the deed without knowledge of the fact that such grantor was insane.

In some cases, equity will protect persons dealing in good faith, and without knowledge, with lunatics who appear to be rational, but in no case will a conveyance of real estate from, or a contract with, such a person be upheld as between the immediate parties, when the transaction is without any

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consideration. In such a case, as the insane person has received no benefit, and the other party suffered no loss, no equity can arise in favor of the other party. *Buswell Insan.*, section 402, and cases there cited.

The important question presented by the pleadings is, whether the defence of insanity may be made against appellant, who, acting upon the faith of the public records of deeds and mortgages, without knowledge of the fact that Emma J. was a person of unsound mind at the time she executed the deed to Henry C., in good faith furnished money to Henry C. and accepted from him the mortgage in suit.

Appellant's pleadings seem to have been drawn largely upon the theory that he could be protected by showing that the conveyance from Emma J. to Henry C. was such that neither she nor her guardian could avoid it in this action, because it had not been disaffirmed, and because the parties had not been placed *in statu quo*.

Appellant can not successfully insist that there must have been a disaffirmance of the deed from Emma J. to Henry C. As already stated, she could not disaffirm, because of her insanity. Her guardian could not have disaffirmed prior to the bringing of the suit, because he had not been appointed at that time. Appellant brought Emma J. into court to answer his bill, and the filing of the answer and cross complaint was a sufficient disaffirmance, both as to him and Henry C., if, in any event, under the facts of the case as shown by the pleadings, a disaffirmance could have been necessary.

Neither can appellant successfully insist that his mortgage shall be protected and enforced, simply because neither Emma J. nor her guardian have refunded, or offered to refund, to him the money he advanced to Henry C. upon the faith of the mortgage. As already stated, it is admitted, that there was no consideration for the deed from Emma J. to Henry C., and it is not shown that she received any of the money

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advanced by appellant, nor that any of it was, in any way, applied for her use and benefit.

Nor can appellant's mortgage be upheld upon the ground that Henry C. was an innocent purchaser from Emma J. In the first place, as we have seen, there was no consideration for the deed; and in the second place, it is not shown that Henry C. did not know that Emma J. was a person of unsound mind at the time the deed was executed. If he had paid a consideration, and the transaction were one that might in any event be upheld, it would still be necessary that Henry C. should have paid the consideration, and accepted the deed, in ignorance of the fact that Emma J. was a person of unsound mind.

When it is established by averment, or by evidence, that the grantor was a person of unsound mind at the time the conveyance was made, the burden is upon the other party to the transaction to show, amongst other things, that he accepted the conveyance in ignorance of such mental unsoundness. *Riggs v. American Tract Society*, 84 N. Y. 330; *Fulwider v. Ingels*, 87 Ind. 414.

Appellant's case, upon the pleadings, is simply this: Emma J., an insane person, conveyed her land to Henry C. without any consideration, who, for aught that appears, accepted the deed with knowledge of her insanity. As against him, she had the right, through her guardian, to have the deed set aside, and the title to the land quieted in her. Appellant, relying upon the public records of deeds and mortgages, advanced money to Henry C., and accepted the mortgage from him, without knowledge that Emma J. was insane at the time she executed the deed. There is nothing to show that any of the money so advanced was received by Emma J., nor that any portion of it was used, or applied for her benefit. Appellant does not allege in any of his pleadings, that he was ignorant of the fact that there was no consideration for the deed from Emma J. In short, it is not shown that there are any equities as between her and appellant. If his mortgage

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may be upheld and enforced against the land, it must be upon the ground that the deed from Emma J. to Henry C. was recorded; that, relying upon the public records of deeds and mortgages, and being ignorant that Emma J. was a person of unsound mind, he advanced money to Henry C. and accepted the mortgage from him.

His counsel argue, that deeds from persons of unsound mind, before an inquest of lunacy, are not void, but voidable only; that the ground upon which such deeds are set aside is fraud, and that fraud, which overthrows such deeds as between immediate parties, will not affect the title of innocent purchasers from the rational party. The position of counsel is too narrow. If it were admitted to be correct, as a rule of law, it would follow, that in no case can the property of a person of unsound mind be reclaimed, unless actual fraud has been practiced, or the conveyance has been accepted with knowledge of such unsoundness of mind, which knowledge, of itself, might amount to fraud. But such is not the law, as we understand it. The courts scrutinize with jealous care all contracts made with persons of unsound mind, and will set them aside if fraud has been practiced.

And so, in all cases, fraud vitiates contracts. But in the case of contracts with persons of unsound mind, the courts do not stop with the inquiry as to whether or not actual fraud may have intervened. Such persons are regarded as within the watchful and protecting care of the courts, and when it is discovered that they have entered into contracts, except in some cases which need not here be enumerated, such contracts will be set aside, because of their mental infirmity, whether there has been actual fraud or not. But if it should be conceded that fraud alone is the ground upon which such contracts are set aside, it would not follow, necessarily, that third parties should be protected as in cases of fraud, where the contracting parties are mentally sound, and capable of managing their property and understanding the force and effect of contracts. In such a case, two rational minds

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meet, agree upon, and, presumably, comprehend the contract. One of the parties, by shrewdness, or by deceit and false representations, may overreach the other, yet that other is rational, and capable of yielding assent to the contract as made. For this reason, he will not be heard to urge the fraud to the detriment of innocent third parties. In some cases, too, one of the parties may have been able to avoid the fraud of the other, by the exercise of reasonable care. With persons, such as it is alleged Emma J. Taylor was and is, the case is radically different. They are wanting in that which is essential in all contracts, the mental ability to comprehend and yield assent to the contract. They can not, therefore, in any case, be chargeable with want of care in being overreached by the other contracting party.

As it is alleged here, that Emma J. Taylor, at the time she executed the deed to Henry C., had the appearance of a sane and rational person, and it does not affirmatively appear that Henry C. had knowledge of the fact that she was a person of unsound mind, we assume for the purpose of this decision, and without stating the reasons or going into an examination of the authorities, that the contract or deed was not void, but voidable only. It was not voidable on the ground of fraud, because no actual fraud is alleged, but voidable because Emma J. was a person of unsound mind. And being voidable on this ground, it is voidable as against appellant. This conclusion, we think, is supported by reason and authority.

In the case of *Somers v. Pumphrey*, 24 Ind. 231 (238), in speaking of an instruction refused below, this court said: "We have already shown, that if the defendants, Isaac and Jonathan Somers, were innocent purchasers, in good faith, for a valuable consideration, their title would not be affected by the fraud of Golvin Somers, or Steinman, in procuring Elizabeth to execute the deed to the latter. But this instruction goes further, and assumes that the same rule would apply if Elizabeth was of unsound mind at the time she executed the

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deed. * * * The contract of a *non compos mentis* differs materially from one procured by fraud from a person of sound mind. In the latter case, the contract is made by one of sufficient capacity, and competent to make it, and his mind has consented to it, but that consent has been induced by the fraud of the other contracting party; but, if the person is *non compos mentis*, there is a want of capacity to contract; he does not, in a legal sense, consent, because there is a want of that mental capacity essential to a legal consent. In this respect, the case seems to be analogous to the contract of an infant, in whom there is, also, a want of capacity to contract, and it has been held that a deed made by an infant might be avoided by his heirs, though the estate had passed into the hands of a *bona fide* purchaser, for a valuable consideration. *Doe, ex dem. Moore, v. Abernathy*, 7 Blackf. 442. We think the instruction was correctly refused."

In the case of *Nichol v. Thomas*, 53 Ind. 42 (53) it was said: "The conveyance of an insane person, but who is apparently sane, stands, in all substantial respects, as the conveyance of an infant."

The case of *McClain v. Davis*, 77 Ind. 419, involved commercial paper in the hands of innocent holders. It was said: "There was nothing received in consideration of the contract under consideration, of which it can be said that restitution should be made before a disaffirmance should be permitted; and it is no objection that the note had passed, before maturity, into the hands of an endorsee. Commercial paper is not an exception to the rule which permits a disaffirmance by any one who was of unsound mind at the time of becoming a party thereto. The purchaser of such paper takes with constructive notice of all legal disabilities of the parties, such as infancy, coverture, and unsoundness of mind."

The cases above cited were approved in the case of *Northwestern Mutual Fire Ins. Co. v. Blankenship*, 94 Ind. 535. The case of *Somers v. Pumphrey*, was also approved in the

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case of *Musselman v. Cravens*, 47 Ind. 1 (9). An act of 1852, and still in force, provides that "Persons of unsound mind and infants may not alien lands nor any interest therein." 1 R. S. 1876, p. 361, R. S. 1881, section 2917.

In the case of *Freed v. Brown*, 55 Ind. 310 (317), in speaking of that act, it was said: "It will be seen from this provision, that persons of unsound mind and infants, so far as the mere right or power to convey lands is concerned, are classed together and clothed with the same disability. It has always been held, however, that the deed of an infant is not void, but merely voidable. * * * We know of no sound reason, either in principle or policy, why the same doctrine should not ordinarily apply to the deeds of persons of unsound mind, nor why such persons, upon the removal of their disability, should not have the same right or power, as infants have, to ratify or to disaffirm their deeds, made while under disability."

In speaking of conveyances by persons of unsound mind, and the rights of innocent purchasers, the Supreme Court of Michigan, in the case of *Rogers v. Blackwell*, 49 Mich. 192, said: "It is further claimed that the defendant mortgagees stand in the relation of *bona fide* purchasers and should therefore be protected. But to protect them would be to give force and effect, to that extent, to the deed of conveyance; to treat it as a valid subsisting instrument; to not consider it as voidable but as valid. If the acts of an insane person can thus be made valid and binding, an easy method is thereby found for disposing of his property. We are of opinion that the complainant is entitled to the relief prayed for."

In the case of *Hovey v. Hobson*, 53 Maine, 451, after holding that a deed of a person of unsound mind, not under guardianship, obtained without fraud, and for an adequate consideration, and that has not been ratified, is not void, but voidable, it was said, in speaking of the rights of a third person as an innocent purchaser: "It is apparent that the

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protection of the insane and the idiotic will be materially diminished, if the heirs can not follow the property conveyed, but are limited in their right of avoidance to the immediate grantee of such insane or idiotic person. The acts of lunatics and infants are treated as analogous, and subject to the same rules. *Key v. Davis*, 1 Md. 32; *Hume v. Barton*, 1 Ridg. Pl. 77. 'The grants of infants and persons *non compos* are parallel both in law and reason.' *Thompson v. Leach*, 3 Mod. 310. The law is well settled that a minor when of age may avoid his deed given when an infant. He may do this not merely against his grantee, but he may follow the title wherever it may be found and recover his land."

After a further discussion of the right of an infant to thus reclaim his land and the reasons upon which that right rests, it was further said: "In this view of the subject, no purchaser under an infant's deed is innocent in the eye of the law, until the title has been confirmed by the matured consent of the grantor." And still further: "When a man is defrauded, he may, as against his grantee, avoid his deed, but not against those deriving in good faith and for an adequate consideration a title from such grantee. He has the ability to convey an indefeasible title,—and he does convey such title to all *bona fide* purchasers from his grantee. The insane man has not the power to convey such indefeasible title. This incapacity inheres in all titles derived from him. The grantee, whose title is thus derived, must rely on the covenants of his deed. He risks the capacity to convey of all through whom his title has passed. The right of infants and of the insane alike to avoid their contracts is an absolute and paramount right, superior to all equities of other persons, and may be exercised against *bona fide* purchasers from the grantee."

Other holdings in that case may not be reconcilable with rulings by this court, and hence we here approve so much of the case only as is to the effect that persons of unsound mind are not estopped to reclaim their land, simply because it may

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have passed into the hands of third persons as innocent purchasers.

We here repeat, what has before been stated, that in the case before us, as made by the pleadings, there is no question of restitution, because Emma J. received nothing directly or indirectly for her land.

In the case of *Wirebach v. First Nat'l Bank*, 97 Pa. St. 543 (39 Am. R. 821), it was held that an accommodation endorser of a promissory note, who receives no benefit therefrom either to himself or his estate, may defend against a *bona fide* holder on the ground that he was *non compos mentis* at the time of the endorsement; and this though the holder had at the time of the transfer to him no knowledge of the endorser's lunacy. In that case the court quoted with approval from the case of *Moore v. Hershey*, 90 Pa. St. 196, the following: "We place our ruling upon the broad ground that the principle of commercial law above referred to does not apply to commercial paper made by madmen. * * * The true rule applicable to such cases is, that while the purchaser of a promissory note is not bound to inquire into its consideration, he is affected by the status of the maker, as in the case of a married woman or a minor. In neither of these cases can he recover against the maker." It was further said: "If the holder could recover against one who was insane when he endorsed or made the note without consideration therefor, no wider door could be opened for the swindler to despoil such helpless persons of their estates. An infant who makes or endorses a note may, by his representative, plead his infancy as a complete defence. In like manner a lunatic may plead insanity and want of consideration. The consideration respects himself, not the holder who may have given value to his endorser. If the fact that the holder had paid value were enough, the lunatic could not defend for fraud upon him or for want of consideration; then an innocent holder could recover, though the judgment would sweep away the lunatic's entire estate, and he had not been benefited a farthing. * * *

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The holder of a madman's note stands in no better position than the payee."

Mr. Bishop, in his work on contracts, at section 297, in speaking of fraud, infancy and insanity, and the rights of third persons as innocent purchasers, says: "If we look for the true reason why, when a man has but a voidable title, he can make, what he has not, a complete one in his grantee, we shall probably find it in the equitable view that he who suffered his own weakness to be imposed upon, and was therefore in a measure to blame, should bear loss rather than the meritorious third person who was clear of every fault. In a case of insanity, the considerations are reversed. To the insane person, not even carelessness can be attributed. And the third person was in a degree careless; because, insanity being usually a permanent condition, he could ascertain its existence by inquiry, as a third person could not a fraud. Therefore, the rule ought to be, that, if real estate, for example, has by the deed of an insane man passed to a grantee who has conveyed it to a third person, though for its full value, and without notice, this third person should have a mere defeasible seizin, like his grantor's."

The above authorities, from which we have made the copious quotations, make strong our conclusion, that appellant may not enforce his mortgage against the land, simply because, in good faith, without knowledge of the mental imbecility of Emma J., and in reliance upon the public records, he advanced money to Henry C., and accepted from him the mortgage. They accord to Emma J. the same right to reclaim her land that is accorded to infants under like circumstances, that is, the right to reclaim the land from an innocent third person, who may have purchased it from her grantee. That an infant has such a right, is settled in this State by the adjudications of this court. *Miles v. Lingerman*, 24 Ind. 385; *Richardson v. Pate*, 93 Ind. 423 (47 Am. R. 374); *Wiley v. Wilson*, 77 Ind. 596; *Law v. Long*, 41 Ind. 586.

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Indeed, it would seem that if there should be any difference between the case of infants and that of a person so imbecile in mind as Emma J. is shown by the pleadings to have been, and to still be, that difference ought to be in favor of the latter.

A person under the age of majority, with a normal mind, may have discretion to understand the force and effect of a contract entered into, and so, the force and effect of a deed for his lands. A person, such as Emma J. is shown to have been, could have no just conception of what she was doing in executing the deed. See *Burke v. Allen*, 9 Foster (N. H.) 106 (117).

However that may be, we are clear that under the averments in the pleadings, Emma J., by her guardian, is not estopped to reclaim the land, and have her title quieted as against any claim of appellant under his mortgage.

The general rule is, that no one can convey a better title than he holds. Under that general rule, Henry C. could convey no better title than he had under his deed from Emma J. On account of her mental imbecility, that title was not indefeasible. The most that can be said for it is, that it may not have been void, but voidable.

The protection extended to innocent purchasers of real estate, rests upon the doctrine of estoppel. The theory is, that the grantor has done something, or omitted to do something, which has induced a third person to act upon the appearance of things, and to invest his money in the land. In other words, some act must be done, or there must be some omission which would render the avoidance of the conveyance a fraud upon the person who invested his money, relying upon the act done, or the appearance of things caused by such omission. It is impossible to conceive how Emma J., in the mental condition she is shown to have been, could have done anything, or been guilty of omission, which could work an estoppel against her. She had no communication or dealings with appellant. She did not cause her deed to

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Henry C. to be recorded, and if she had, that act ought not to estop her, because she had no more mental ability to comprehend its meaning than she had to comprehend what she was doing in executing the deed. She could not be guilty of wrong in a business transaction, because she lacked the ability to bind herself by such a transaction. And for want of such ability, she could not be guilty of an omission that would estop her. But, in fact, the only thing she did, was to execute the deed to Henry C. She thus put it in his power to cause a record of it to be made that might mislead others. But for that act she is not responsible, for the same reason that she was not mentally competent to execute the deed.

What we have said, is limited to the case before us, as made by the pleadings. If it were shown that a consideration had passed from Henry C. to Emma J. for the deed, or if it were shown that the money advanced by appellant, and received by Henry C., has been used and applied for the use and benefit of Emma J., possibly the case might be different. What the rule in that case might be, we do not decide, because the pleadings do not make such a case.

Here, there are no equities as between Emma J. and Henry C., because there was no consideration for the deed, either by or of anything advantageous to her, or detrimental to him. Neither are there equities as between her and appellant, because she had no dealings with him, and no part of the money advanced by him to Henry C. was used or applied for her benefit. It results from what we have said, that the court below did not err in sustaining the demurrers to appellant's pleadings.

At the request of appellant, the court below made a special finding of the facts. Appellant now insists that the conclusions of law, based on the facts so found, are erroneous, and that, therefore, the judgment in favor of Emma J. should be reversed.

Appellees' counsel, on the other hand, contend that appel-

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lant did not preserve an exception to the conclusions of law in such a manner as to present any question here. That contention can not be disregarded without disregarding the statutory provision as to the time at which such an exception must be taken.

The special finding of facts and conclusions of law thereon were announced, and filed, on the 31st day of December, 1883. No exception was taken to the conclusions of law on that day.

Nothing further was done in the case until the 3d day of January, 1884. Of the proceedings in the case on that day, there is this entry: "Come the parties, appearing as heretofore, and the plaintiff (appellant) now excepts to the special finding of the court, and the conclusions of law therein contained, and heretofore filed," etc.

It is settled by the decisions of this court, that in order to save any question for review here, in a case like this, an exception to the conclusions of law must be taken at the time the decision is made. *Smith v. McKean*, 99 Ind. 101; *Kolle v. Foltz*, 74 Ind. 54; *Johnson v. Bell*, 10 Ind. 363; *Dickson v. Rose*, 87 Ind. 103; *Coan v. Grimes*, 63 Ind. 21 (27); *Dickson v. Lambert*, 98 Ind. 487; *Cincinnati, etc., R. R. Co. v. Leviston*, 97 Ind. 488.

It is argued by appellant's counsel, however, that as appellees were present in court on the 3d day of January, 1884, when the court noted the exception to the conclusions of law, and made no objection to the exception then taken and noted, the exception may be made available; in other words, that appellees, by their silence, waived the objection which they now make.

We are unable to understand how the silence of appellees can, as to them, operate as a waiver, or in any way render the exception available, as it might have been if taken at the proper time. The statute requires, that in order to save any question, by an exception to the conclusions of law, it must be taken at the time the decision is made.

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In this case it was not so taken. The taking and noting of an exception, several days subsequent to the decision, did not and could not have the effect of making the exception then taken relate back to the time when it ought to have been taken. We do not see how the action of the court in permitting appellant to except on the 3d day of January, 1884, and in noting that exception, although without objection by appellees, can in any way affect their rights.

The important question is, not when, and under what circumstances was the exception noted, but when was it, in fact, taken. It is not claimed that it was taken at the time the decision was made; indeed, the exception as noted, shows that it was taken to a decision made prior to the time when it was taken and noted.

A former statute provided, as does the statute now in force, with an exception not material here, that a motion for a new trial must be filed at the term at which the verdict or decision is rendered. -

It has been held in a number of cases, that, under those statutes, such a motion may be filed at a subsequent term, by the agreement of the parties, and that if filed at a subsequent term, without objection from the party adversely interested, when he might have objected, such want of objection will be taken as a waiver of the objection that the motion was not filed within the time fixed by the statute. There is some analogy between such a case and the case before us, but we think the analogy is not so strong as to make the rulings in those cases conclusive here. A motion for a new trial invites and requires further action by the court.

After the court and the parties have acted on such a motion, there is reason in saying that the parties should not be allowed to say that the motion was filed too late.

An exception, such as that taken in this case, does not require any action by the court, or the parties, and hence appellant can not say that he was in any way misled by the silence of appellees.

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It is further contended by appellees, that no question is presented by the assignment, alleging error in overruling appellant's motion for a new trial, for the reason that the record does not show that the bill of exceptions was filed within the time allowed by the court, or filed at all, and especially, that it does not show that the long-hand manuscript of the evidence was filed in the clerk's office.

On the 12th day of January, 1884, the court overruled appellant's motion for a new trial, and granted to him forty days within which to file a bill of exceptions.

The clerk below has copied into the transcript an entry made by him, in which it is stated that on the 23d day of January, 1884, appellant presented to the judge, in open court, a bill of exceptions for his signature, and that it was, at that time, signed. At the conclusion of that entry, is this: "Which bill of exceptions reads as follows, to wit:" Immediately following that statement in the record, is a bill of exceptions. At the end of the bill is the signature of the judge. Immediately preceding that signature is this: "And the court, on the plaintiff's motion, hereby certifies, that the foregoing is a true bill of exceptions, setting forth all the evidence given on the trial of said cause. And the same is ordered to be made a part of the record of said cause. Done this 28th day of January, A. D. 1884."

It is recited in the bill, that Joseph W. Brackenridge, a short-hand reporter, was appointed and sworn to report the evidence, etc. Preceding the signature of the judge, and in the body of the bill, there is a long-hand manuscript of the evidence, attached to which, at the close, is a certificate by Mr. Brackenridge, in which he certifies that "the foregoing is a full, true and complete long-hand manuscript of all the evidence given in the foregoing entitled cause, taken and made from a *verbatim* short-hand report," etc.

In the certificate of the clerk below to the transcript, it is stated that "the foregoing is a full and complete transcript of the proceedings had, papers filed, and judgment rendered

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in the above entitled cause, and also the long-hand manuscript of the short-hand reporter, sworn in said cause, which is filed herein and made part of the record."

It thus appears that the record consists of a transcript of the proceedings had, papers filed, etc. In other words, the transcript contains copies of such papers only as were filed. A bill of exceptions, including the long-hand manuscript of the evidence, made a part of it when filed, is clearly a paper in the cause. It is thus made to appear that the bill of exceptions was filed. It also appears that it was filed within the time fixed by the court.

The time given was forty days from the 12th day of January, 1884. The transcript was completed, and the clerk's certificate attached on the 15th day of February, 1884. It thus necessarily appears that the bill of exceptions was filed within the time given by the court. *Armstrong v. Harshman*, 93 Ind. 216.

It is further contended by appellees' counsel, that there is nothing to show that the long-hand manuscript of the evidence was filed in the clerk's office separate and apart from the bill of exceptions, and prior to its being incorporated therein.

The bill of exceptions, as we have seen, was filed within the time given. The long-hand manuscript of the evidence was a part of the bill, and was, therefore, filed. It is not necessary to the filing of a paper that it shall be endorsed as having been so filed. Such an endorsement is the evidence of, but not the filing. A paper is filed when it is delivered to the proper officer, and by him received to be kept on file. *Powers v. State*, 87 Ind. 144. The certificate of the clerk shows too, pretty clearly, that the long-hand manuscript of the evidence, in the record before us, was also filed, separate and apart from the bill of exceptions of which it was made a part. Whether so filed before the bill was filed, does not appear. Nor do we think it essential that it should so appear. The statute, section 1410, R. S. 1881, is somewhat

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confused, but in our judgment, if the long-hand manuscript of the evidence is filed with, and as a part of, the bill of exceptions, that is sufficient; and when thus filed, it may be taken from the bill of exceptions and be made a part of the record on appeal to this court, without being copied. Such is the scope of the rulings in the later cases. *Williams v. Pendleton, etc., T. P. Co.*, 76 Ind. 87; *Marshall v. State, ex rel.*, 107 Ind. 173; *Lowery v. Carver*, 104 Ind. 447; *Dennis v. State*, 103 Ind. 142; *Brehm v. State*, 90 Ind. 140; *Lee v. State, ex rel.*, 88 Ind. 256; *Woollen v. Wishmier*, 70 Ind. 108; *Galvin v. State, ex rel.*, 56 Ind. 51.

We do not think that the case of *Reid v. Houston*, 49 Ind. 181, supports, to the full extent, appellees' contention here. It can not be ascertained from an examination of that case, that what was there said in relation to the long-hand manuscript of the evidence upon appeal, was material to the case before the court.

This brings us to an examination of appellant's motion for a new trial. He chose his mode of trial, and that was by a special finding of the facts, and conclusions of law thereon. The question then is, not whether, upon the whole evidence, he should recover, not whether there are equities between the parties, or an estoppel of any kind as against Emma J., but whether the trial court correctly found the facts. *Robinson v. Snyder*, 74 Ind. 110.

In their brief, appellant's counsel concede that the evidence sustains the special finding of facts, except as to the consideration for the deed from Emma J. to Henry C., and as to the unsoundness of Emma's mind. It was found as a fact, in the special finding of facts, that Emma J. is now, and always has been, a person of unsound mind, and incapable of managing her estate; that in 1883 she was so adjudged, and a guardian of her person and estate was appointed.

The evidence abundantly sustains the special finding as to the condition of her mind. It not only shows that she was

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incapable of managing her estate, but also that she was utterly incapable of comprehending and understanding the force and effect of the deed, which she signed by her mark.

As to the consideration counsel say: "The court, in its special finding of facts, wholly fails to find that there was a consideration for the deed from Emma J. Taylor," etc.

The special finding upon that question is as follows: "Henry C. paid nothing at the time of the making of said deed for said lands, but it was stated by said Catharine Taylor (mother of Emma J.), in the presence of said Emma J., that said Emma was to be maintained there as long as she lived, and said Emma and said Henry C. continued to live on said lands, using the same as before the execution of said deed; the said Henry C. working on said farm as before, and said Emma receiving the same maintenance as before, that is, they both lived on said lands as one family, and were maintained therefrom, both before and after the making of said deed, without change as to living and maintenance."

If it be said that the finding, as made, amounts to a finding that there was no consideration for the deed, then we can not disturb the finding upon the weight of the evidence. The evidence, we think, not only tends to sustain the finding, but amply sustains it.

It is stated in the finding, that Catharine Taylor stated in the presence of her daughter, Emma J., that she was to be maintained on the farm as long as she lived. That finding was made upon the evidence of Henry C. It appears, however, that the statement was not made in his presence. He learned of that statement from Catharine Taylor, and her communication of it to him was not in the presence of Emma J. There is nothing to show that he, in any way, ever agreed or bound himself to maintain Emma J. on the farm, or to do anything else in consideration of the conveyance. It is stated in the special finding that he and Emma J. continued to live on the land, using the same as before the execution of the deed, and there is nothing to show that

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Henry C. did anything in pursuance of any agreement, or as a consideration for the conveyance. See, as bearing on the case, *Ikerd v. Beavers*, 106 Ind. 483.

If it be said that the special finding is, in some measure, a finding of evidence, and not of facts, and that, disregarding such evidence, the special finding is so defective, uncertain and ambiguous as that it ought to be corrected, then appellant should have sought a remedy by a motion for a *venire de novo*. That he did not do.

The court did not err in refusing to allow appellant to examine Emma J. as a witness. She had been adjudged to be insane, and was under guardianship. Her condition was no better at the time of the trial. Such persons are not competent witnesses. R. S. 1881, section 497.

There was no exception to the ruling of the court in declining to have Emma J. sworn, and to examine her with a view of ascertaining her mental condition, and hence no question is presented here upon that ruling.

In no event, could such an experiment be of any avail, unless it were shown that her condition at the time of the trial was the same, or about the same, as at the time when the deed was executed. There was no offer to produce such evidence.

After the testimony in the case was closed, except a few questions to one witness, appellant requested the court to put Emma J. "in charge of three reputable physicians for the purpose of making a complete and thorough examination as to her mental condition." That the court refused. There was no error in such refusal. In the first place, the court was not bound to stop the case at that stage in its progress, for the purpose of selecting physicians and having such an examination made. Whether, if appellant had used proper diligence, and made such a request at an earlier time in the progress of the case, it ought to have been granted, is a question we need not, and do not decide. In the second place, there was no offer, or proposal, to make the result of such

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an examination material, by showing that the mental condition of Emma J., at the time, was the same, or substantially the same, as at the time the deed was executed.

We have given to the several questions discussed by counsel a careful and patient examination, and are constrained to hold that there is nothing presented by the record that would justify a reversal of the judgment.

Judgment affirmed, with costs.

Filed Feb. 1, 1887.

No. 12,885.

COLLINS v. RUPE.

DRAINAGE.—Petition.—Highway.—Description.—A petition for drainage is not bad for merely failing to give the name of the civil township in which a public highway, which it is alleged will be benefited, is situate.

From the Jay Circuit Court.

J. W. Headington, J. J. M. LaFollette and J. F. LaFollette,
for appellant.

T. Bosworth and O. H. Adair, for appellee.

MITCHELL, J.—This was a proceeding in the Jay Circuit Court, under the act of March 8th, 1883, for the establishment of a public drain.

The proceedings are challenged on the ground that the petition was insufficient. The petition alleged, among other things, that a public highway running east and west between sections thirty and thirty-one, in township twenty-two north, of range fourteen east, would be benefited by the proposed drain.

The only objection suggested to the petition is, that it fails to give the name of the civil township in which the public highway, which, it is alleged, would be benefited, is situate.

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There is no substantial merit in this objection. The public highway, to which it is alleged benefits will accrue, is described in the petition, and the number of the township in which the highway is situate is therein given.

The statute requires a description, together with the names of the owners, of lands to be affected by the drain to be set out in the petition. It also provides what shall be a sufficient description of the right of way of any railroad company believed to be affected by the proposed drain. It then provides that the petition shall also state "that in the opinion of the petitioners or petitioner either that the public health will be improved or that one or more public highways of the county" will be benefited by the proposed drainage, or that the work proposed will be of public utility.

The statement concerning the benefit to public highways, is not required to be set out, with a view of imposing a charge upon the township, but is one of the several averments, indicating the public utility of the work, necessary to give the court jurisdiction. Unless the petition states either that the work proposed will improve the public health, benefit one or more public highways of the county, or be of public utility, it can not be entertained. *Bass v. Elliott*, 105 Ind. 517.

The petition in question states that the proposed work will improve the public health, benefit a highway described as above, and that it will be of public utility. It was, therefore, sufficient, without giving the name of the civil township as contended for.

After the commissioners of drainage, to whom the matter was referred, made their report, the appellant remonstrated, assigning as cause that the report of the commissioners was contrary to law, that the assessments against the lands of the remonstrants were too high, and that the proposed drain would neither improve the public health, benefit one or more public highways of the county, nor be of public utility.

Upon the hearing the court confirmed the assessments as

The Indiana, Bloomington and Western Railway Company v. Sawyer.

made, and found and adjudged that the proposed drain would improve the public health, and would be of public utility.

It is now contended that the finding and judgment are not sustained by sufficient evidence. The evidence, it is said, fails to show that the highway described in the petition would receive any substantial benefit. The report of the drainage commissioners only assessed the sum of two dollars benefits to the highway against the township.

Upon examination we find evidence tending to show that the proposed drain would carry off water from the vicinity of a public school-house, and that it would improve the public health and be of public utility. This supports the finding and judgment below.

The judgment is affirmed, with costs.

Filed Feb. 1, 1887.

No. 12,787.

THE INDIANA, BLOOMINGTON AND WESTERN RAILWAY
COMPANY v. SAWYER.

RAILROAD.—*Fence.—Stations and Sidings.—Liability for Animals Killed.—*

Instruction.—A railroad company is not required to fence its track at stations or sidings where freight is received and discharged, and is not liable for killing animals which enter upon its track at such places, and it is error to refuse to so instruct the jury where there is evidence to which such an instruction is applicable.

From the Warren Circuit Court.

C. W. Fairbanks and T. F. Davidson, for appellant.

W. E. Baker, for appellee.

NIBLACK, J.—This action was commenced before a justice of the peace, and was afterwards appealed to the Fountain Circuit Court, whence the venue was changed to the Warren Circuit Court.

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The complaint charged that, on the 29th day of November, 1884, Charles Sawyer was the owner of a horse of the value of \$100, and that, on that day, the horse entered upon the track of the Indiana, Bloomington and Western Railway Company at a point at which it was not securely fenced in, and was run over and killed by the locomotive and cars of the railway company, in the county of Fountain, in this State.

Sawyer obtained a verdict for \$100, and, over a motion for a new trial, raising several questions upon the proceedings at the trial, had judgment on the verdict.

Sawyer was a witness in his own behalf. He testified to his ownership and the value of the horse described in the complaint; that, about the time named in the complaint, he found the horse dead near the railway company's track, in Fountain county, under circumstances indicating that it had been killed by a locomotive and cars passing over the track; that the horse's tracks in the snow indicated that it had entered upon the railway track through a cattle-pit at a highway crossing; that the cattle-pit was only about five inches deep, and a part of it had slipped to one side so that the horse could easily pass through it.

On cross-examination, Sawyer stated that there was a switch and side-track at the highway crossing; that the side-track extended east and west on both sides of the highway at the crossing, and was used by the railway company for putting in and taking out cars, and in receiving and discharging freight, as the business at that place required; that he had seen brakemen employed on the railway, running along on the ground at the place named, in doing their work of putting in and taking out cars; that it seemed to be necessary for the brakemen, in doing their work, to pass along the side-track and over the point where the horse got on the track and through the cattle-pit. There was other evidence tending to corroborate the statements thus made by Sawyer on his cross-examination.

At the proper time, the railway company, by its attorney,

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asked the court to give to the jury a series of instructions, the fourth and fifth of which were as follows:

"4th. If the horse in question got onto the defendant's railway track from a highway crossing, at a point where the defendant had a side-track crossing the highway, on which it received and discharged freight, and which it had constructed and used for the convenience of the public and in the transaction of its business with them, then the defendant was not required to fence or inclose its track at that point, and the plaintiff could not recover.

"5th. The law does not require the defendant to fence its road at stations or sidings where freight is received and discharged, and the defendant is not liable in an action like this for stock that may get upon the track at such point and get killed."

The court refused to give the instructions thus set out, and failed to give any other instruction covering the same ground, or embracing the same subject-matter, and upon that refusal a question was reserved, and is now again presented.

The instructions in question stated the law correctly as abstract legal propositions, and were, as has been seen, applicable to a material part of the evidence given at the trial. Under such circumstances the court erred in refusing to give the instructions. The doctrine of these instructions was fully considered in the recent case of *Indiana, etc., R. W. Co. v. Quick, ante*, p. 295, and upon the authority of that case the judgment in this case ought to be reversed.

The judgment is reversed, with costs, and the cause remanded for a new trial.

Filed Feb. 1, 1887.

 Roby v. Pipher et al.

No. 12,719.

ROBY v. PIPHER ET AL.

EVIDENCE.—*Failure to Sustain Material Issue.*—*Reversal of Judgment.*—Where the evidence wholly fails to sustain the finding upon a material issue, the cause will be remanded for a new trial.

SAME.—*Payment.*—For evidence held not sufficient to establish a plea of payment, see opinion.

From the Harrison Circuit Court.

G. W. Self, W. N. Tracewell and R. J. Tracewell, for appellant.

W. Cook, for appellees.

Howk, J.—In this case, the appellant, Roby, the plaintiff below, substantially alleged in his complaint that he had sold the appellees six hundred saw-logs at the agreed price of \$1.50 per log, amounting in the aggregate to the sum of \$900; that, of this sum, appellees had paid him \$547.50, leaving a balance of \$352.50 still due him from appellees and wholly unpaid. Wherefore, etc.

Appellees answered by a general denial of the complaint, and a plea of payment, to which appellant replied by a general denial. The issues joined were tried by the court, and a finding was made for appellees, the defendants below; and over appellant's motion for a new trial, the court adjudged that he take nothing by his suit, and that appellees recover of him their costs herein.

The only error assigned here by appellant is the overruling of his motion for a new trial. The causes assigned for such new trial were, that the finding of the court was not sustained by sufficient evidence, and was contrary to law.

Appellant had the burden of the issue joined on his complaint, while the appellees had the burden of the issue joined on their plea of payment. It was shown by appellant on the trial, that appellees bought of him the logs mentioned in his complaint, under the terms of a written contract exe-

109	345
130	130
109	345
140	359
109	345
147	118

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cuted by them. We set out so much of this contract as applies to this case, as follows:

"Laconia, Ind., Nov. 15th, 1883. Pipher & Hamilton this day bought of Mr. Curtis Roby * * * all the poplar, oak and hickory timber on what is known as the 'Home Place,' for \$1.50 per log, bad hearts to be measured out; Mr. Roby to cut this timber down, to be paid for when cut down."

By an abundance of uncontradicted evidence, appellant further showed that, long before the commencement of this suit, he had cut down "all the poplar, oak and hickory timber on * * * the Home Place," and that such timber made about six hundred "logs," within the meaning of appellees' contract. So that, if the issue joined by the answer in denial of the complaint had been the only issue in this case for trial, it is very clear, we think, that appellant would have been entitled to a finding and judgment for the full amount of his claim herein.

We come now to the consideration of the issue joined on appellees' plea of payment, as to which issue, as we have already said, the burden was on them to sustain it by the evidence. There was a failure of evidence, we think, to sustain the plea of payment. This evidence consisted of the testimony of the two appellees, and there was not entire harmony in their evidence. Appellee Hamilton testified that, about three weeks before the trial, he offered to pay appellant for some of the logs, but he did not remember how many. "Mr. Roby would not take the money," the witness testified; "he claimed that we owed him for more." If the appellees did not owe Mr. Roby "for more," appellee Hamilton did not so testify. Appellee Pipher testified: "We claim that we have paid Mr. Roby all that we owe him;" and again: "We paid him for all the timber that was suitable for sawing." This evidence wholly fails to show that the appellees had, in compliance with their written contract,

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paid appellant \$1.50 "per log" for all the poplar, oak and hickory timber, cut down by him on the "Home Place."

We are of opinion, therefore, that the trial court clearly erred in overruling appellant's motion for a new trial. This is not a case of conflicting evidence. It is simply a case of the failure of evidence, on the part of appellees, to sustain their plea of payment. The case is not governed or controlled, therefore, by the long established rule, that this court will not disturb the verdict of a jury or the finding of a trial court upon the mere weight or preponderance of the evidence. Where, as in this case, the evidence wholly fails to sustain the verdict or finding, upon a material issue in the cause, it is as much the duty of this court to reverse the judgment below and remand the cause for a new trial, as it would be for any error of law occurring at the trial and excepted to. This is settled by our decisions. *Roe v. Cronkhite*, 55 Ind. 183; *Butterfield v. Trittipo*, 67 Ind. 338; *Kitch v. Schoenell*, 80 Ind. 74.

The judgment is reversed with costs, and the cause is remanded with instructions to sustain the motion for a new trial, and for further proceedings.

Filed Jan. 6, 1887; petition for a rehearing overruled Feb. 1, 1887.

No. 12,025.

BALFE ET AL. v. LAMMERS ET AL.

INJUNCTION.—*City.*—*Street Improvement.*—*Collection of Unauthorized Assessment.*—Injunction will lie to restrain the collection of an assessment for a street improvement levied upon property which the city had no power to assess for such improvement.

CITY.—*Street Improvement.*—*Assessment.*—*Complaint to Enjoin Collection.*—*Ordinance.*—*Yeas and Nays.*—*Estimate.*—*Mistake.*—Questions as to the taking of the yeas and nays on the passage of an ordinance, as to the amount

109	347
139	110
109	347
150	555
109	347
153	574

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of the estimate and as to a mistake in describing the property, can not be presented by a complaint to enjoin the collection of a street improvement assessment.

SAME.—*Appeal from Precept.—Conclusiveness of Judgment.—Description.—New Precept.*—Where, on appeal by a property-owner from a precept, the proceedings are sustained, and judgment is rendered in favor of the contractor, the latter is concluded by it, if unappealed from, as to all questions before the court, including the validity of the estimate and the sufficiency of the description, and can not take out another precept.

From the Tippecanoe Circuit Court.

W. C. Wilson and J. H. Adams, for appellants.

W. C. L. Taylor and B. W. Langdon, for appellees.

ELLIOTT, C. J.—The complaint of the appellees is for an injunction restraining the appellants from collecting an assessment made for the cost of improving a street. There are many allegations in the complaint that are out of place in a suit for an injunction brought after the completion of the improvement.

The question as to whether the yeas and nays were taken on the passage of an ordinance can not be presented by a complaint for an injunction, unless the suit is brought before the work is done. That question, if it can be made at all after the completion of the work, can only be made by appeal from the precept. We are, indeed, inclined to the opinion that it can not be made in any event after the contract has been awarded. *Taber v. Grafmiller*, ante, p. 206; *Taber v. Ferguson*, ante, p. 227.

The question as to whether the estimate was made for the proper amount can not be put in issue by a suit for an injunction. That question must be made and tried on appeal, for appeal is the remedy provided by law, and, as is well known, an injunction will not lie where there is a legal remedy.

Nor can a mere mistake in describing the property be tried by injunction; that, like the questions already discussed, can only be tried on appeal. The law is that all questions which

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are properly triable on appeal must be so tried, and not by injunction, except such questions as go to the power and jurisdiction of the common council. It is to such questions that the decisions in *Wilson v. Poole*, 33 Ind. 443, *Goring v. McTaggart*, 92 Ind. 200, *City of Fort Wayne v. Shoaff*, 106 Ind. 66, are applicable.

The complaint avers that the property does not abut on South street, and, as that was the street improved, this averment makes the complaint good, for the power to assess property was confined to lots abutting on the street improved at the time the work was done. It is not within the jurisdiction of the common council to tax property not embraced within the provisions of the act of incorporation. *City of Fort Wayne v. Shoaff*, *supra*.

At the time the contract was awarded and the estimate issued, the act of incorporation did confine the power of the city to assess property to the lots bordering on the street, although the law has since been changed. *Ray v. City of Jeffersonville*, 90 Ind. 567.

It is also alleged that Henry Lammers, the appellees' ancestor, appealed from the precept, and that on the trial of the appeal a judgment was, on the 25th day of March, 1875, rendered against him for \$1,353. Upon this judgment executions were issued. This judgment concludes the appellants, and they can not disregard it and take out another precept. All questions relevant to the validity of the assessment were before the court in that case, and under the rule laid down in the often approved case of *Fischli v. Fischli*, 1 Blackf. 360, those questions are conclusively settled. If the appellants were not satisfied with the judgment in their favor, their remedy was by appeal. The case is utterly unlike one in which judgment is given the land-owner on account of errors in the proceedings of the common council, for here the judgment is in the contractors' favor on all those questions, and they were awarded a recovery. If the recovery was not such as they were entitled to, their remedy was by appeal. They can not escape

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the force of that judgment, for it was not founded on errors in the corporate proceedings. The cases which hold that where the contractor is defeated on the ground that the proceedings were erroneous, he may commence back of the first error and correct the proceedings, are not in point.

The answer admits the issuing of the first precept, the appeal and the judgment. It sets forth a copy of the judgment or decree, from which it appears that the sum of \$1,353 was awarded the appellants; that of this sum \$1,120.26 was the amount of the estimate, and that the remainder of the judgment was for interest. It further appears that a lien was declared in favor of the appellants, and that it was ordered to be foreclosed.

The attempt of the pleader to avoid the effect of this decree is futile. It fully covers the whole case and adjudicates all questions. It may have been erroneous, but that can not be investigated in this collateral proceeding. There is a personal judgment, and that merges the claim of the appellants. The quotation from Freeman on Judgments, section 218, has no relevancy here, for here there was jurisdiction of the subject-matter and of the parties. There was in this case no mistake as to the parties, and the case of *Wizom v. Stephens*, 17 Mich. 518, is not at all in point.

The decision in the case of *Conyers v. Mericles*, 75 Ind. 443, and cases based upon it, can not be applicable here, for here there was no contract between the parties in which there could be a mistake. The mistake in the description in a mortgage is a mutual mistake of the contracting parties, but in such a case as this there are no parties to the contract except the city and the contractors. In such a case as this one of the principal questions for trial on appeal from the precept is whether the estimate properly describes the property. That is a question directly in issue, and one that must be decided, for, in strictness, the proceedings are against the property. *City of New Albany v. Smith*, 16 Ind. 215. It is evident, therefore, that a judgment in favor of the contractor settles

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the question as to the validity of the estimate and the sufficiency of the description. Estoppels by judgment are mutual, and surely a property-owner could not enjoin the enforcement of a decree rendered on an appeal from a precept, on the ground that the estimate was invalid because the property was not properly described. The answer is bad, and the court did right in sustaining the demurrer to it.

The evidence shows that there was a former adjudication, and it is therefore unnecessary to examine it further.

Judgment affirmed.

Filed Feb. 1, 1887.

109	351
125	303
126	330
127	438
109	351
131	188
109	351
1164	561

No. 12,621.

VINTON v. THE BUILDERS AND MANUFACTURERS ASSOCIATION ET AL.

MECHANIC'S LIEN.—*Notice.*—*Act of 1883.*—*Section 5 Construed.*—Under section 5 of the act of March 6th, 1883 (Acts of 1883, p. 140), concerning mechanics' liens, a verbal notification to the owner or his agent that material is being furnished to or work performed for the contractor, is sufficient to enable a material man or mechanic to acquire a lien.

SAME.—*Word "Notify."*—*Meaning of.*—The word "notify," used in such section, never imports or implies, of necessity, a notice in writing, and such notice will not be required unless it is clear that it was so intended.

From the Marion Superior Court.

S. Claypool and W. A. Ketcham, for appellant.

E. A. Parker and L. B. Swift, for appellees.

HOWK, J.—In their brief of this cause, appellant's learned counsel say: "There is but one question presented by the record, viz.: What is the proper construction to be given to section 5 of the act of March 6th, 1883, in regard to mechanics' liens?"

The act referred to by counsel is entitled "An act con-

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cerning liens of mechanics, laborers, and material men," was approved March 6th, 1883, and, by virtue of an emergency declared, was in force from and after its passage. Acts of 1883, p. 140, *et seq.* Section 5 of such act reads as follows:

"To enable the mechanics or other persons furnishing material or performing labor, as above provided, to a contractor, to acquire such lien, he must at or before the time he furnishes the material or performs the labor, notify the owner or his agent that he is furnishing the materials or performing the work for the contractor."

In our decision of this cause, we shall confine our opinion strictly to the consideration of the question, as above stated by appellant's counsel. This question is fairly presented for our decision, by the record of this cause and the error assigned thereon. Without stating the record or any part thereof, it will suffice to say that it became a question in the cause below, whether or not the appellant as owner was entitled, under the provisions of section 5 above quoted, to notice in writing from the persons who were seeking to enforce alleged liens against her or her property, for materials furnished or labor performed to or for her contractor; or whether or not a verbal notice merely from such persons to her or her agent was a sufficient compliance with the requirements of such section of the statute, to enable such persons to acquire the lien mentioned therein. The court at special term held, and the general term affirmed such decision, that mechanics or other persons are not required, under such section 5 of the statute, to notify the owner or his agent in writing, but that a verbal notification to the effect specified therein, given at or before the time mentioned, to the owner or his agent, will be a sufficient compliance with such section of the statute to enable such mechanics or other persons to acquire the lien provided for therein. If this construction of section 5, above quoted, be the correct construction, the judgment below must be affirmed. If, however, the true construction of such section 5 required that appellant, or her

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agent, should have been notified in writing, then the judgment below must be reversed.

We are of opinion that the court below, both at special and in general term, has given the true construction to section 5, above quoted, of the act of March 6th, 1883, concerning liens of mechanics, laborers and material men. The word *notify*, used in such section, is a compound word of Latin derivation, and its primary and literal meaning is "to make known." According to the best American lexicographers of the English language, Webster and Worcester, the secondary meaning of the word *notify* is "to give notice to;" though it is conceded that the use of the word, in this secondary sense, is not sanctioned by English usage. Webster gives and illustrates this secondary meaning of the word "notify," as follows: "To give notice to; to inform by words or writing, in person or by message, or by any signs which are understood; as, the constable has *notified* the citizens to meet at the city hall; the bell *notifies* us of the time of meeting." It is clear from these secondary definitions of Webster, and clearer still, if possible, from his illustrations, that the word *notify* never imports or implies, of necessity, a notice in writing. Whenever it is intended that the word "notify," as used in a statute, shall signify a notice in writing, we think that such intention should be expressed in words, or should be implied by, or be apparent from, other provisions of the same statute. There is nothing in the statute under consideration to indicate that the word "notify" is used in section 5 of the act, in any other than its primary and literal meaning. On the contrary, we think it clearly appears from all the provisions of the statute, that whenever it was intended by the law-making power that notice in writing must be given, such intention is expressed therein in clear and unmistakable terms. Indeed, the rule is general that, unless otherwise provided by statute, a verbal notice will, in all cases, be as effective as a written notice, provided

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it conveys the necessary information between the proper parties, at or within the prescribed time.

What we have said, disposes of the controlling question in this case, adversely to the views expressed by appellant's counsel in argument. The conclusion we have reached, that a verbal notification to the appellant or her agent was a sufficient compliance with the requirements of section 5 of the statute, so far as the kind of notice is concerned, necessarily leads to the affirmance of the judgment below. For the facts found by the trial court fully support, we think, its conclusions of law, to the effect that the authorized agents of appellant were verbally notified by the appellees, at the proper time, that they were severally furnishing materials for her contractor.

The judgment is affirmed, with costs.

Filed Nov. 23, 1886; petition for a rehearing overruled Feb. 1, 1887.

 No. 11,938.

ROSZELL v. ROSZELL.

DEED.—*Reformation.*—*Mistake.*—*Mutuality.*—*Estoppel.*—*Contract.*—Where one party to an agreement has knowledge of a mistake, and of the other party's ignorance thereof, and with such knowledge remains silent when he should speak, he is estopped to defeat a reformation by asserting that the mistake lacks mutuality.

SAME.—*Title Bond.*—Where one purchases and pays full consideration for land held by his vendor by title bond, and it is agreed that the latter shall cause a conveyance to be made to the purchaser, but, without his knowledge or consent, causes the conveyance to be made to the purchaser's son, a reformation of the deed can not be defeated on the ground that the mistake is not mutual.

SAME.—*Statute Construed.*—*Parent and Child.*—The operation of section 2974, R. S. 1881, is restricted by subsequent sections to cases in which the party claiming the benefit of an alleged trust, himself created what he afterwards claims to be a trust, and does not prevent a father, who

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has paid the purchase-money, from showing that the deed was made to a child through mistake, or contrary to his intention.

SAME.—Acquiescence.—Burden of Proof.—In a suit to reform a deed, brought within twenty years, the burden is on the defendant to show that there was such acquiescence on the part of the plaintiff, after knowledge of the mistake, as to render it inequitable to grant the relief asked.

From the Decatur Circuit Court.

J. K. Ewing and *C. Ewing*, for appellant.

F. E. Gavin, for appellee.

MITCHELL, J.—The facts in this case are stated, and an important preliminary question decided, in *Roszell v. Roszell*, 105 Ind. 77. The case is now before us for decision upon its merits, the errors assigned being that the court below erred in overruling the appellant's demurrer to the complaint, and in overruling his motion for a new trial.

In substance, the complaint discloses the following facts: In 1862 James M. Roszell enlisted in the army. Having received \$175 bounty money, he purchased a lot of Smith Armstrong, which the latter owned by title bond only. Roszell paid the entire purchase-price to Armstrong, who still owed to his vendor part of the purchase-price. This Armstrong agreed to pay. He also agreed that he would cause his vendor to make a deed conveying the lot to Roszell. Subsequently, while James M. Roszell was in the army, Armstrong paid the balance of the unpaid purchase-money, but, contrary to his agreement with Roszell, and without the latter's knowledge or consent, he caused the deed to be made to Leonidas Roszell, an infant son of James M. After the close of the war James M. took possession of the lot, made lasting and valuable improvements upon it, which cost some \$500 or more. It is alleged that the deed was executed to his son by mistake. Prayer for an order that the lot be conveyed to the plaintiff, and that his title should be quieted.

On appellant's behalf it is now contended that, upon the facts stated in the complaint, the plaintiff below was not entitled to any relief. It is said that in order to justify the in-

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tervention of a court, there must have been a mutual mistake by both parties to the deed, and that because the grantor was not mistaken, and the infant grantee was invested with the title without any mistake on his part, and without having invested the money of another, and taken the title in violation of any agreement, the court had no jurisdiction to afford relief.

Of course, when the action is to reform an instrument, on the simple ground that a mistake has occurred in the written memorial of the agreement between the parties, it must appear that the mistake was mutual, and that the reformation is necessary in order that the writing may correctly speak the agreement, as it was actually made and understood by both parties. The reformation is not to make a new agreement, but to establish and perpetuate the old one. *Welshbillig v. Dienhart*, 65 Ind. 94.

When, however, it is once conceded that the deed or instrument in question does not correctly state the facts actually agreed upon, the conclusion follows, either that the parties were mutually mistaken as to the facts therein recited, or that one party has been overreached or disappointed by the conduct of the other. In either event, the case stands for relief upon its own ground. If the mistake be that of one party only, its consequences will be determined accordingly as the other was, or was not, cognizant of or responsible for the mistake. *Worley v. Moore*, 97 Ind. 15; *Kerr Fraud and Mistake*, pp. 409-413.

The agreement having been satisfactorily established, if it appears that the mistake was known to one of the parties, who, with knowledge of the ignorance of the other, nevertheless kept silent when he should have spoken, the party having knowledge will be estopped to defeat a reformation by alleging that he knew that the instrument was different from the agreement.

It being admitted by the demurrer that James M. Roszell paid the entire purchase-price, and that Armstrong agreed to

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cause his vendor to convey the lot to him, Armstrong will not be heard to say that the conveyance to the infant son was not a mistake on his part. The appellant, the son, having paid nothing, can not, while admitting the agreement between his father and Armstrong, and that his name, instead of the name of his father, was inserted in the deed as grantee by mistake, assert that the mistake may not be corrected for want of mutuality. Armstrong's vendor had no further interest in the transaction than to receive the money due on the title bond and make the deed as directed by the former. The transaction was between Armstrong and James M. Roszell, and because Armstrong's vendor made the deed to the appellant in good faith, in ignorance of the mistake, is no reason why a court of equity should be prevented from looking at the real transaction, and dealing with it accordingly. *Murray v. Sells*, 53 Ga. 257; *Phenix Ins. Co. v. Allen*, ante, p. 273.

It is said that because the appellant was the mere passive recipient of the title, without any wrong-doing on his part, he took an absolute title in the lot so conveyed to him, freed from any trust under section 2974, R. S. 1881. This section provides that: "When a conveyance for a valuable consideration is made to one person, and the consideration therefor paid by another, no use or trust shall result in favor of the latter; but the title shall vest in the former, subject to the provisions of the next two sections." The case falls directly within the first clause of the second section following, which is in effect, that the provisions of section 2974 shall not extend to cases where the alienee shall have taken an absolute conveyance in his own name without the consent of the person with whose money the consideration was paid. The operation of section 2974 is restricted by the subsequent sections to cases in which the party claiming the benefit of an alleged trust, himself created what he afterwards claimed as a trust.

The purpose of the statute relied on was to prevent par-

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ties who had purposely and perfectly executed voluntary settlements, and had caused lands to be conveyed to others, from engrafting trusts upon such settlements and conveyances, solely upon the ground that the party seeking to establish such trust had paid the consideration for the conveyance. *Hosford v. Merwin*, 5 Barb. 51; *Perry Trusts*, section 98, *et passim*.

This statute does not prevent a father who has paid the purchase-money from showing that the deed was made to a child through mistake, or contrary to his intention. *Perry Trusts*, section 148.

The demurrer to the complaint was properly overruled. The evidence fairly sustains all the material averments in the complaint.

Lastly, it is contended that the plaintiff below acquiesced in the deed as made for a period of thirteen years, during which time he remained in possession and made valuable improvements on the lot. Hence it is argued, he has slept upon his rights so long, that a court of equity will afford him no relief.

It does not appear from anything contained in the record when the appellee became aware of the mistake in the deed. It does not appear that rights in third parties have intervened or grown up under the deed, the correction of which was sought, or that the defendant in any way changed his situation.

It was incumbent on the defendant to make it appear—less than twenty years having elapsed—that there was such acquiescence, after knowledge of the mistake, as would now render it inequitable to afford the relief to which the plaintiff would otherwise have been entitled. This has not been done. *Morrison v. Collier*, 79 Ind. 417; *Hill Trustees*, p. 269; *Hutson v. Fumas*, 31 Iowa, 154; *Lindsay v. Davenport*, 18 Ill. 375. There was no error.

The judgment is affirmed, with costs.

Filed Jan. 27, 1887.

Tilford v. The State.

No. 13,502.

TILFORD v. THE STATE.

INTOXICATING LIQUOR.—Druggist.—Physician.—Sale on Sunday.—Written Prescription.—A sale of intoxicating liquor on Sunday, by a druggist, without a written prescription, is an offence under section 2099, R. S. 1881, although the druggist is himself a physician.

From the Morgan Circuit Court.

L. Ferguson and *C. G. Renner*, for appellant.

L. T. Michener, Attorney General, and *W. B. Hord*, for the State.

ELLIOTT, C. J.—The statute makes it an offence for “any druggist or druggist’s clerk” to sell liquor on Sunday, “unless the person, to whom the same is sold, * * shall have first procured a written prescription therefor from some regular practicing physician of the county.” R. S. 1881, section 2099.

In *Barton v. State*, 99 Ind. 89, it was held, in a carefully considered and well written opinion, that the provision of the statute requiring a written prescription is imperative, and we can see no possible reason for departing from that opinion, for it gives just effect to the words of the statute, prevents abuses, and produces a wholesome result.

In this case there was no written prescription from any physician, and we can not hold the appellant excused upon the ground that he was himself a physician. The statute makes no exceptions, and the court can not create them except in very clear cases and where there is an imperious necessity, and then only in order to prevent manifest injustice. *Eastman v. State*, ante, p. 278.

A person who sells in defiance of the provisions of the law does so at his peril. It is possible that there may be cases of urgent necessity demanding immediate action, where a druggist would be held excused for selling liquor without a “written prescription,” but this is not such a case; on the contrary, the evidence impresses us with the belief that the liquor was

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not sold exclusively for medicinal purposes, for no medical examination was made, and no necessity shown for selling the liquor in violation of law.

There is a reason, and a solid one, for requiring a "written prescription," for it is evidence of a tangible and lasting form, and it puts a professional man upon record as having deliberately advised a patient to buy, and a druggist to sell, liquor on Sunday. It is an effective means of preventing abuses, and is quite as important in a case where the druggist is himself a physician as in any other. But we need not pursue the discussion further, for the statute says there must be a "written prescription," and it is the duty of everybody, physicians as well as any one else, to obey the law.

Judgment affirmed.

Filed Feb. 2, 1887.

No. 12,993.

ZARTMAN, TRUSTEE, v. THE STATE, EX REL. CHAMP ET AL.

SCHOOL FUNDS.—*Expenditure in Anticipation.*—*Implied Pledge.*—Where the expenditure of any school fund has been lawfully anticipated, as by contracting debts or borrowing money on the faith of such fund when it becomes available, it is thereby impliedly pledged to the use to which it has been so applied in advance.

SAME.—*Mandamus.*—*Township Trustee.*—*Town.*—*School Buildings.*—Mandamus will not lie to compel a township trustee to pay to the school trustees of an incorporated town school funds which had been impliedly pledged by his predecessor, prior to the incorporation of the town, for the payment of a debt contracted by the township in the erection of a school building within the town limits, and which funds, otherwise, the school authorities of the town would be entitled to receive.

From the Miami Circuit Court.

H. J. Shirk, J. Mitchell, R. P. Effinger and R. J. Loveland,
for appellant.

J. M. Brown, N. N. Antrim and D. P. Baldwin, for appellees.

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NIBLACK, J.—This was a proceeding in the name of the State, on the relation of John Champ, Ephraim Clendenning and John S. Wilson, as trustees of the school town of Macy in Allen township, of Miami county, in this State, against John Zartman, trustee of said township of Allen, for a writ of mandate requiring the latter to pay over to the relators certain school funds alleged to be in his hands and to belong to said school town of Macy.

The affidavit alleged that the town of Macy was duly incorporated by the board of commissioners of said county of Miami at their March term, 1884, and has ever since continued to be an incorporated town; that the relators were, as the school trustees thereof, entitled to receive and to control all the school funds which belonged to said town of Macy, and to the persons attached thereto for educational purposes; that, at his settlement with the auditor of said county of Miami, in June, 1884, the defendant, Zartman, as trustee of the school township of Allen aforesaid, received of school funds, belonging alike and *pro rata* to said township of Allen and to said town of Macy, including the persons and territory attached thereto for educational purposes, the sum of \$157.72, of which \$21.36 belonged to the relators in their capacity as school trustees, as herein above stated; that at said June settlement, in the year 1884, the said Zartman received the further sum of \$951.87, consisting of special and common school revenue belonging, in like manner, to the said school township of Allen and to the said town of Macy, and those attached thereto, of which the relators, in their said capacity as trustees, were entitled to receive \$182; that at his January settlement with said county auditor in the year 1885, the said Zartman received the still further sum of \$874.25, consisting also of special and common school revenue, of which the relators, in their said trust capacity, were entitled to receive and control \$167.16, making the total sum of \$370.52, which the relators claimed they were so entitled to receive and control; that the said Zartman, upon demand,

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had failed and refused to pay over said last named sum, or any part thereof, to the relators. Wherefore an alternative writ of mandate was demanded.

An alternative writ of mandate was accordingly issued, and Zartman, appearing, demurred upon the ground that the facts alleged were not sufficient to entitle the relators to the relief demanded, but his demurrer being overruled, Zartman made return to the writ, admitting that the town of Macy had been incorporated as alleged; that the relators were the school trustees of said town; that he, Zartman, had, on the 17th day of April, 1884, become, and still was, the trustee of the school township of Allen, as charged, and that he had school funds in his possession as stated, and averring:

First. That \$41.28 of the money demanded by the relators was raised by taxes levied prior to the 1st day of April, 1883, and was in the hands of his predecessor before the town of Macy was incorporated.

Secondly. That he, the said Zartman, became the trustee of the school township of Allen on the 17th day of April, 1884, and at that time received from his predecessor in office the sum of \$288.96; that at the distribution of school funds in May, 1884, he received the further sum of \$951.87, and that at the December distribution in 1884, he received the additional sum of \$874.75, making in all the sum of \$2,115.58, and comprising the only moneys which had come into his hands as such trustee, prior to the commencement of this proceeding; that all of said money was raised from taxes assessed as of the 1st day of April, 1883, and of dates prior thereto; that, by reason of the premises, the relators were not entitled either to demand or receive any of the moneys so in his, the said Zartman's, possession.

Thirdly. That since his election as trustee of said school township of Allen, there had come into his, the said Zartman's, hands money raised by special tax for school purposes, and belonging to the special school revenue the several sums mentioned in the second paragraph hereof, which was all the

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money belonging to the common school fund which had come into his hands before the commencement of this suit; that said several sums of money were raised by taxes assessed long before the incorporation of said town of Macy; that the above named sum of \$288.96 came into the hands of his predecessor in office before said town of Macy was incorporated; that in the year 1882 the school township of Allen purchased land within the present limits of said town of Macy, paying therefor the sum of \$250 out of the special school revenue of such school township, and in the year 1883 erected on the land so purchased a large brick building for the school purposes of the township at a cost of about \$5,000; that at the time he, the said Zartman, became the trustee of said township, as herein above stated, said township, as a school corporation, was indebted to one Charles H. Brownell for money borrowed for, and used in, the construction of said school building, in a sum exceeding \$3,000; that out of the special school revenue which had so come into his hands, he, said Zartman, had paid to the said Brownell upon such indebtedness amounts as follows: On the 27th day of June, 1884, \$1,061.11; on the 9th day of January, 1885, \$143.36; that a sum exceeding \$2,000 was still due upon said indebtedness; that at the time of the incorporation of said town of Macy, and for some time prior thereto, said school building had been entirely completed, and was under the exclusive control of said school township, and had been, and still was, used by such township for school purposes; that said building was at the time of its incorporation, and still continued to be, within the corporate limits of said town of Macy; that at the time of its incorporation, said town took possession and exclusive control of said building, and still continued in such possession and exclusive control; that said town had failed and refused to contribute anything to discharge the indebtedness incurred in the construction of said building, and that the application of the money in his hands to the payment of such indebtedness was the only way known

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to him, said Zartman, by which said town could be compelled to contribute its just proportion to the discharge of said indebtedness; that he was awaiting the determination of this suit before he would apply the remaining money in his hands to the further extinguishment of such indebtedness. Wherefore he claimed that he ought not to be required to pay over any of the school moneys then in his hands to the relators.

Fourthly. That the said school town of Macy, upon facts alleged as above, was indebted to the school township of Allen in the sum of \$350, for the use and occupancy of the school building constructed by said township as herein above set forth, which sum he, Zartman, asked to have set off against the amount demanded by the relators.

A demurrer was sustained to all the paragraphs of Zartman's return, and he declining to make further return, the alternative writ of mandate was made peremptory, and he was ordered to pay over to the relators, as trustees of the school town of Macy, the sum of \$370.52 out of the special school revenue in his hands as trustee of the school township of Allen, and judgment was rendered against him for costs.

Error is assigned upon the overruling of the demurrer to the alternative writ of mandate, and the sustaining of demurrers to the several paragraphs of Zartman's return, but the argument submitted on Zartman's behalf is addressed only to the alleged sufficiency of the return to the alternative writ of mandate.

The alternative writ of mandate constituted a good *prima facie* case for the relief demanded, and was, hence, as a complaint, sufficient upon demurrer. *Johnson v. Smith*, 64 Ind. 275; *Hon v. State, ex rel.*, 89 Ind. 249.

It has been in effect held by this court in many instances, that any of the school funds, except the fund for tuition, may be expended in anticipation, that is to say, may be practically pledged in advance by entering into contracts, contracting debts or borrowing money on the faith of such funds when they shall become available. *Harney v. Wooden*, 30 Ind.

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178; *Sheffield School Tp. v. Andress*, 56 Ind. 157; *Bicknell v. Widner School Tp.*, 73 Ind. 501; *Wallis v. Johnson School Tp.*, 75 Ind. 368; *Pine Civil Tp. v. Huber M'f'g Co.*, 83 Ind. 121; *State, ex rel., v. Snodgrass*, 98 Ind. 546.

Accepting the averments of the third paragraph of the return to the alternative writ of mandate as true, as the demurrer to it did, the expenditure of all the school funds in Zartman's hands had been anticipated by the contraction of a debt, or rather by borrowing money, upon the faith of such funds, to erect a school-house within the territorial limits of the town of Macy.

A state of facts was, consequently, presented which would render it highly inequitable to require Zartman to pay over to the relators in this case a part of such funds in his hands to be applied to purposes other than the payment of the debt contracted for the erection of the school-house in question. The fair inference from all the decided cases, having any reference to the subject, is, that where the expenditure of any school fund has been lawfully anticipated, the fund becomes thereby impliedly pledged, or set apart, to the use to which it has been so applied in advance. This brings us to the conclusion that the court below erred in sustaining the demurrer to the third paragraph of Zartman's return to the alternative writ of mandate, and that for that reason the judgment ought to be reversed.

The judgment is reversed, at the costs of the relators, and the cause is remanded for further proceedings not inconsistent with this opinion.

Filed Feb. 2, 1887.

Waltman v. Rund *et al.*

No. 12,419.

WALTMAN v. RUND ET AL.

DEDICATION.—*Statutory.*—*User.*—*Town.*—*Streets and Alleys.*—Streets and alleys of a town, as fixed by continuous user for more than twenty years, will prevail as against a prior invalid statutory dedication.

SURVEY.—*County Surveyor.*—*Conclusiveness of Decisions.*—Decisions by a county surveyor are only conclusive, when not appealed from, in cases where he is called upon to perform a duty enjoined upon him by law.

From the Brown Circuit Court.

G. W. Cooper and *W. M. Waltman*, for appellant.

R. L. Coffey and *W. R. Harrison*, for appellees.

ELLIOTT, C. J.—In the year 1836, William Snider owned a tract of land on which he desired to locate a village, and in that year he made a plat of the proposed village and designated streets and alleys thereon. But this plat was not executed as the statute required, and was not good as a statutory dedication. *Allen v. City of Vincennes*, 25 Ind. 531; *Taylor v. City of Fort Wayne*, 47 Ind. 274; 2 Dillon Munic. Corp. (3d ed.), section 628.

The plat was founded on an erroneous description of the land, and this error materially changed the dimensions and location of the streets and alleys, and the user by the public did not correspond with the streets and alleys as designated on the plat of the village. As the attempted statutory dedication was invalid, the location and dimensions of the streets and alleys were fixed by the user which began as early as 1840, and as fixed by that user they must be regarded as now existing. The streets and alleys as established by this user are as they are claimed by the appellee to be, and this claim must prevail over that based on the plat executed in 1836. There are, indeed, no highways except such as the user created.

There is no question of estoppel in the case, for the facts stated in the special finding show that the appellant acquired

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no rights until after the streets and alleys had been fixed and located by continuous user for more than twenty years.

The appellees were not bound by the decision of the county surveyor made in April, 1879. The surveyor was not called upon "to establish, relocate, or perpetuate corners," but he was called upon "to make a survey of the lots, streets, alleys and lines of the town of Georgetown." The decision of the surveyor is not conclusive in such cases, for his decision is only conclusive, when not appealed from, in cases where he is called upon, after due notice to land-owners, "to establish, relocate or perpetuate corners."

The case of *Herbst v. Smith*, 71 Ind. 44, is not in point, for, in that case, the surveyor was called upon, after due notice, to perform a duty enjoined on him by law, and to act in a matter where his decisions, if not appealed from within three years, became conclusive.

Judgment affirmed.

Filed Jan. 28, 1887.

No. 12,763.

BRYAN v. SCHOLL.

PLEADING.—Answer.—Prior Action Pending.—A plea of prior action pending, in order to suspend or abate the action to which it is pleaded, must show that the action pending is between the same parties, and for the same cause as that involved in the action sought to be abated.

SAME.—An answer to a complaint in ejectment, which alleges that the plaintiff's right to recover is based upon a decree of foreclosure; that within a year from the rendition of such decree the defendant therein brought proceedings in the proper court for a review of such judgment and decree; that the court in such proceedings decided adversely to the defendant and rendered judgment against him therein; that the defendant had prayed an appeal from such judgment last named, filed an appeal bond, and directed the clerk to make a transcript, which he intended to file in the office of the clerk of the Supreme Court, upon

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its completion, and praying that the proceedings be held in abeyance until his proposed appeal should be decided, is insufficient for any purpose.

SAME.—Demurrer.—Form of.—Plea in Abatement.—A demurrer to a plea in abatement in the ordinary form, alleging that the answer does not state facts sufficient to constitute a cause of defence, is sufficient.

EVIDENCE.—Description of Real Estate.—Omission of County.—Judicial Knowledge.—Where the plaintiff in an ejectment suit derives his title from a sheriff's deed, on decree in foreclosure proceedings, it is competent for him to introduce in evidence the decree, the certified copy thereof issued to the sheriff and the notice of sheriff's sale, although neither of them recites in terms that the land therein described is situate in the county where the proceedings were had; it appearing from the complaint, and the mortgage exhibited therewith, that the land was in such county, and the documents offered in evidence containing a proper description of such land by township and range, which brings the location thereof within the judicial knowledge of the court.

From the Clinton Circuit Court.

J. V. Kent and *J. W. Merritt*, for appellant.

S. H. Doyal and *P. W. Gard*, for appellee.

MITCHELL, J.—This was a suit in ejectment, the complaint being in the usual form for the recovery of real property.

The defendant filed an answer which is denominated a plea in abatement. It alleged, in substance, that the plaintiff based his right to recover the land in dispute upon a decree of foreclosure, given against the defendant by the Clinton Circuit Court, in favor of one Heavilon. It was averred, that within a year from the rendition of the decree through which the plaintiff claimed, the defendant below filed his complaint in the proper court, asking for a review of the judgment and decree, and that such proceedings were had in that behalf, as that the Clinton Circuit Court, upon the hearing, adjudged that he was not entitled to a review, and gave judgment against him accordingly.

The answer alleged further, that the defendant had prayed an appeal from the judgment in the proceedings for review, to the Supreme Court; that he had filed an appeal bond, and directed the clerk to make a transcript of the record, which

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he intended to file in the office of the clerk of the Supreme Court, immediately upon its completion.

Upon the facts thus summarized, the court was asked to hold the proceedings in abeyance until the proposed appeal should be decided.

A demurrer was sustained to the answer, and this ruling is assigned as error.

The answer was clearly insufficient for any purpose. It shows affirmatively that no appeal had been perfected at the time of the commencement of this suit, and if a perfected appeal from the judgment in the proceedings for review had been shown, that would have been no cause for the abatement of this action. A plea of prior action pending, in order to suspend or abate the action to which it is pleaded, must show that the action pending is between the same parties, and for the same cause as that involved in the action which is sought to be abated. 2 Works Pr. and Pl. 684; *Board, etc., v. Lafayette, etc., R. R. Co.*, 50 Ind. 85, 117; *Commissioners, etc., v. Holman*, 34 Ind. 256; *Fitzgerald v. Gray*, 61 Ind. 109; *Eiceman v. State, ex rel.*, 75 Ind. 46; *Merritt v. Richey*, 100 Ind. 416.

If an appeal had been perfected, the facts set out in the answer might have constituted sufficient ground for an application to the court to stay proceedings. As to this, however, we decide nothing. *Walker v. Heller*, 73 Ind. 46.

Some criticism is made upon the form of the demurrer. It is said, the ordinary form, that the answer does not state facts sufficient to constitute a cause of defence, is not sufficient when addressed to a plea in abatement.

We have been cited to no authority, and are not aware of any, which makes a distinction in the form of a demurrer, when addressed to a plea in abatement or other answer.

Speaking of general and special demurrers, and the proper occasion for their use, a standard author on pleading and

Bryan v. Scholl.

practice says: "The plaintiff, however, need never demur specially to a plea in abatement." 1 Tidd Pr. 695.

After the demurrer to the plea in abatement had been sustained, the defendant answered the general denial, and upon the issue thus made finding and judgment followed, upon a trial by the court, against the appellant.

At the trial the court admitted in evidence the complaint and proceedings in the foreclosure suit, already referred to, including the decree of foreclosure and the certified copy thereof, issued to the sheriff, together with the return showing the sale, and also the certificate of purchase and the sheriff's deed to the appellant.

These all appear to be regular, except that in the decree of foreclosure and the certified copy thereof issued to the sheriff, and in the published notice of the sale, the county in which the land is situated is not named. It is now contended that because of this omission, and because there was no proof, *aliunde*, that the lands described in the decree were the same lands as those described in the complaint for foreclosure, and in the sheriff's deed and the other proceedings, the court erred in admitting the decree, and the copy certified to the sheriff, and the notice of sale, in evidence.

Conceding all that is said concerning the necessity that the lands should be identified in the decree of foreclosure, the evidence objected to was nevertheless properly admitted.

The foreclosure proceedings were commenced, and the decree rendered, in the Clinton Circuit Court. No objection was made to the jurisdiction of the court. The mortgage, a copy of which was made part of the complaint in the foreclosure proceedings, describes the land as being in Clinton county. The decree and notice of sale described the land correctly, except that they did not recite in terms that it was situate in Clinton county, in the State of Indiana. Both the decree and notice did, however, contain the recital that the several tracts of land described were all in "township twenty-

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one (21) north, of range one (1) west." The decree on its face directed the sheriff of Clinton county to sell the lands therein described, in default of payment of the sum of money found due. It will be presumed, therefore, to say the very least, that the lands were in the State of Indiana, and if in Indiana, since Clinton is the only county in the State which contains within its boundaries a township and range answering the description above set out, it conclusively follows from such description that the land was in Clinton county. *Brown v. Ogg*, 85 Ind. 234; *Dutch v. Boyd*, 81 Ind. 146; *Brown v. Anderson*, 90 Ind. 93; *Smith v. Clifford*, 99 Ind. 113; *Stockwell v. State, ex rel.*, 101 Ind. 1. This disposes of the questions made. There was no error.

The judgment is affirmed, with costs.

Filed Feb. 2, 1887.

No. 12,805.

BAALS v. STEWART.

PLEADING.—Conversion.—Complaint to Recover Damages.—A complaint to recover damages for the conversion of personal property need not allege that the plaintiff is entitled to possession of such property.

SAME.—Joinder of Causes of Action.—Under the fourth clause of section 278, R. S. 1881, a paragraph of complaint to recover damages for conversion may be joined with a paragraph to recover possession of the same property.

CONDITIONAL SALE.—Personal Property.—Conversion.—Liability of Third Person.—Damages.—A conditional sale of personal property is valid, and if the vendee, without the knowledge or consent of the vendor, sells the property to a third person, who converts the same to his own use, the latter acquires no title as against the original vendor, and is liable to him for the damages sustained.

ESTOPPEL.—Pleading.—To constitute an estoppel *in pais* there must be a showing that the party pleading it was induced to act to his injury by

109	371
136	597
109	371
136	597
109	371
144	53

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something said or done by the other, or that there was misrepresentation or concealment of a material fact on the part of the latter.

From the Allen Circuit Court.

R. S. Robertson, for appellant.

J. B. Harper, for appellee.

Howk, J.—In this case the appellee sued the appellant in a complaint of two paragraphs, but the first paragraph was subsequently withdrawn by appellee, leaving the second paragraph as his only complaint in the record. In this complaint appellee alleged that he was the owner of a certain piano, numbered 26,799, made by the Emerson Piano Company of Boston, Massachusetts; that such piano was of the value of \$150; that the appellant unlawfully and wrongfully retained possession of such piano, and had unlawfully and wrongfully converted the same to his own use, to appellee's damage in the sum of \$250, for which sum he demanded judgment, and for all other proper relief.

To this complaint appellant answered in two paragraphs, whereof he subsequently withdrew the first paragraph. In the second paragraph of his answer, appellant stated special and affirmative facts by way of defence; and to this paragraph appellee's demurrer, for the alleged insufficiency of the facts therein to constitute a defence, was sustained by the court. Appellant failed to answer further, and, by his consent, the cause was tried by the court without a jury, and the court found for the appellee and assessed his damages in the sum of \$108.12, and rendered judgment accordingly, to which judgment appellant at the time excepted.

In this court appellant has assigned errors which call in question (1) the overruling of his demurrer to the second paragraph of complaint, (2) the sustaining of appellee's demurrer to the second paragraph of appellant's answer, (3) the overruling of his motion for an order requiring appellee to answer certain interrogatories more specifically, and (4) the rendition of judgment herein for appellee on the pleadings.

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We will consider and decide the several questions presented by these alleged errors in their enumerated order.

1. Appellant demurred to the second paragraph of appellee's complaint, upon two grounds of objection, namely: 1st. It did not state facts sufficient to constitute a cause of action; and, 2d. Because it stated a claim for damages for the wrongful conversion of the piano, and was improperly joined with a paragraph which sought to recover the possession of such piano. Of course, this demurrer was filed before the withdrawal by appellee of the first paragraph of his complaint.

It is impossible for us to know what cause of action was stated in the first paragraph of appellee's complaint. It is not in the record, and while it may have stated, as appellant's counsel claims it did, a cause of action in replevin, yet, so far as we are informed by the record, which to us imports "absolute verity," it may as well have stated a cause of action on a promissory note, as one in replevin.

In discussing the ruling of the court below on the second paragraph of complaint, appellant's counsel says: "We claim that it does not state facts sufficient to constitute a cause of action, for the reason that, while it alleges ownership in appellee, it does not allege that he was entitled to the possession." It was not necessary that the second paragraph of the complaint should allege that appellee was entitled to the possession of the piano. In this paragraph appellee did not seek to recover possession of the piano, but simply sued to recover damages for the unlawful and wrongful conversion of the piano by appellant to his own use. For that purpose the paragraph stated facts amply sufficient to withstand appellant's demurrer thereto; and, so far as the first ground of objection is concerned, there was certainly no error in overruling such demurrer. *Reish v. Reynolds*, 68 Ind. 561; *Stockwell v. Thomas*, 76 Ind. 506.

But appellant's counsel insists, that the demurrer ought to have been sustained because of the improper joinder of causes of action. If counsel were right in this position, the error

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of the court in overruling the demurrer, for the misjoinder of causes of action, would not authorize us to reverse the judgment herein. Section 341, R. S. 1881; *Rennick v. Chandler*, 59 Ind. 354; *Coan v. Grimes*, 63 Ind. 21. But as the case is presented by the record before us, there was no misjoinder of causes of action, for two reasons: 1. Because appellee withdrew the first paragraph of his complaint, and no cause of action appears in the record except the one stated in the second paragraph of complaint; and, 2. Because, under the *fourth* clause of section 278, R. S. 1881, a paragraph of complaint to recover damages for the wrongful conversion of personal property may be properly joined with another paragraph to recover the possession of the same property, in the same complaint. In any view of the case at bar, therefore, the demurrer to the second paragraph of appellee's complaint was correctly overruled.

2. In the second paragraph of his answer, which was addressed to each and both of the paragraphs of complaint before the withdrawal of the first paragraph thereof, the appellant said that, while he denied any wrongful taking or wrongful possession by him, and any unlawful and wrongful conversion by him, of the piano described in the complaint, he admitted that such piano came into his possession under the following circumstances, to wit: That the appellee delivered such piano into the possession of one Wm. G. Chenowith, on the 17th day of July, 1882, at Lafayette, Indiana, without causing to be executed or recorded any bill of sale or chattel mortgage thereof, but that said Chenowith, on the day last named, executed to appellee two certain promissory notes, each of which had attached thereto a contract which could be separated from the note without impairing it in any way, copies of which notes and attached contracts were filed with such answer and referred to as parts of such answer; that such notes and attached contracts were accepted by appellee as evidence of Chenowith's indebtedness for said piano, and the transaction was treated by appellee as a conditional sale

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or a payment by note, at his option; that by the terms of each note, Chenowith promised to pay appellee certain fixed sums, at fixed times, at the Second National Bank of Lafayette, a bank of issue and deposit in this State; that neither of said notes had any condition therein as to the title to such piano, but one clause in each note reads as follows: "This note is received as a conditional settlement for —, No. —. If this note is not accepted by R. W. Stewart, Lafayette, Ind., then this contract is void, and — hereby expressly agrees to return to R. W. Stewart said instrument for which this note was given, and no contract or claims will be recognized, unless embodied in this note;" that said Stewart not only accepted such notes, but he procured the same to be discounted in bank, by endorsing on each of them his written guaranty that it would be paid within thirty days.

And appellant further alleged, that the contract following each of such notes declared that the "above note" was given as evidence of a part of the price to be paid for such piano, and that Stewart had agreed to sell and had delivered the same, but that it was to remain the property of appellee until all the notes were paid, and that "this statement may be detached from the above note, without being deemed an alteration or mutilation thereof;" that Chenowith, on January 9th, 1884, paid appellee \$25, on March 26th, 1884, \$25, and on June 25th, 1884, \$20, which sums he accepted and credited upon the first of such notes; that soon after appellee delivered possession of said piano to Chenowith under such notes and attached contracts, Chenowith, with appellee's knowledge and consent, removed such piano from Lafayette to Fort Wayne, Indiana, in which latter place he continued to reside with appellee's knowledge until the early part of 1885; that, on November 30th, 1884, Chenowith publicly offered said piano for sale for a considerable period of time, when appellee's notes were long past due, without any effort on his part to repossess himself of such piano; that appellant was then and since engaged in the business of buying

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and selling second-hand furniture in the city of Fort Wayne, and when such piano was offered to him by Chenowith, the latter represented himself to be the owner of the piano and that there were no liens or claims thereon, nor was there any chattel mortgage of such piano of record in the recorder's office of Allen county; that believing such representations of Chenowith to be true, and relying upon the records of such recorder's office, appellant, in good faith and in the regular course of business, purchased said piano from Chenowith who had been, for more than two years, in undisturbed possession thereof as its apparent owner, for a valuable consideration and with the knowledge and acquiescence of appellee; that soon after appellant so purchased said piano, he sold the same in the regular course of his business to a customer, whose name was unknown to him, and, since such sale, he had no control over or possession of said piano; that such sale was made by appellant before he had any knowledge, information or reason to believe that appellee, or any other person, had or claimed to have an interest in said piano; and appellant admitted that such piano was worth \$150, and that, at the commencement of this suit, there was due appellee from Chenowith on said notes the sum of \$70, and interest and attorneys' fees; and appellant averred that, by reason of his acts and the facts aforesaid, appellee was and ought to be estopped from asserting any claim to said piano or for the value thereof, and he demanded judgment.

We have given appellant the benefit of a fuller statement of the second paragraph of his answer, than we otherwise would have done, for the reason that we have found it difficult to determine upon what precise theory the pleading was constructed. It would seem from the entire paragraph of answer, that it was prepared by the pleader for a two-fold purpose, namely: 1. To show as nearly as it could be done, by the note and agreement executed by Chenowith to the appellee, and the delivery of the possession of the piano by appellee to Chenowith, the sale of the piano was not conditional,

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but absolute, and the title to the instrument passed at once to Chenowith, as purchaser. And, 2. If the sale of the piano to Chenowith should appear to be conditional, and not absolute, to show that appellee, by his conduct and laches in the premises, had estopped himself from asserting his title to such piano, or any claim for damages for the wrongful conversion thereof by appellant to his own use.

As to the first of these purposes, it will suffice to say, we think, that Chenowith's note and agreement to and with the appellee, which were executed contemporaneously and must be construed together as parts of one and the same transaction, and which were a part of appellant's answer herein, show very clearly that appellee did not sell, but only agreed to thereafter sell, the piano described in the complaint to Chenowith, and that such instrument was to remain the property of appellee until it was fully paid for; and that, until that time, Chenowith should have no property in, and no right to sell, mortgage, pledge, or make any other disposition whatever of, the aforesaid instrument.

The legality and validity of such a conditional sale of personal property have often been recognized in the decisions of this court. In *Lanman v. McGregor*, 94 Ind. 301, a case similar in some of its features to the case in hand, this court said: "Where, in such a case, the vendee of the personal property, without the knowledge or consent of the vendor, sells the property to third parties, who convert the same to their own use, they acquire no title to the property as against the original vendor, and are liable to him for its value or, as in this case, for the balance due him from his vendee on the agreed price thereof." Upon the same subject, see, also, the following cases: *Bradshaw v. Warner*, 54 Ind. 58; *Evansville, etc., R. R. Co. v. Erwin*, 84 Ind. 457; *Payne v. June*, 92 Ind. 252.

In so far as the answer attempted to show that appellee was estopped, by his conduct or laches, from asserting his claim for damages for the wrongful conversion of his piano, it

Cottrell *et al.* v. Nixon.

seems to us that the facts stated were wholly insufficient to constitute a valid estoppel *in pais*. It was not shown that appellee misrepresented to, or concealed from, appellant any material fact, or that appellant was induced to act in the premises by anything said or done by appellee. *Long v. Anderson*, 62 Ind. 537; *Lash v. Rendell*, 72 Ind. 475; *Buck v. Milford*, 90 Ind. 291.

The court did not err, we think, in sustaining appellee's demurrer to the second paragraph of appellant's answer.

3. It is claimed that the court erred in overruling appellant's motion for an order requiring appellee to answer two interrogatories more specifically. There is no available error, we think, in this ruling of the court. To the first of these interrogatories, the answer was indefinite as to time, but so was the interrogatory. To the last of the two interrogatories the answer was: "I can not remember." This answer was as specific as it could be made, if it was true; and appellant's motion did not question its truth.

We have found no error in the record of this cause which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed Dec. 11, 1886; petition for a rehearing overruled March 11, 1887.

109	378
124	461
109	378
135	539
109	378
139	593
109	378
147	419
109	378
162	478
162	480

No. 12,877.

COTTRELL ET AL. v. NIXON.

SPECIAL FINDING.—*Failure to Find Facts.*—*Venire de Novo.*—Where a special finding is so indefinite, by reason of an omission to find the facts, that it is incapable of supporting any conclusions of law, or of forming the basis of any judgment on the issues involved, a *venire de novo* should be granted.

From the Henry Circuit Court.

Cottrell *et al.* v. Nixon.

D. W. Kinsey, D. W. Chambers and J. S. Hedges, for appellants.

J. Brown, W. A. Brown and W. O. Barnard, for appellee.

MITCHELL, J.—This case was tried upon a complaint consisting of two paragraphs. The first is a common count to recover the balance due for a printing press, with certain fixtures and attachments, alleged to have been sold and delivered by the plaintiffs to the defendant, at his especial instance and request.

The second alleges, that in consideration that the plaintiffs, at the request of the defendant, agreed to sell and deliver the property therein mentioned to E. Pleas & Co., within thirty days from the 10th day of October, 1882, the defendant agreed to be responsible, and pay the price agreed upon for such property.

Afterwards, it is alleged, the time for delivering the property was extended with the knowledge and consent of the defendant, and on the faith of such promise and guaranty, which, together with the contract of sale, is alleged to have been in writing,—copies of the writings being set out,—it is alleged the goods were delivered to E. Pleas & Co., due notice to the defendant of the delivery having been given.

Upon issues made by a denial, the case was tried by the court. At the request of the plaintiffs, the court made a special finding of the facts, and stated conclusions of law thereon.

As the only question for decision arises on the special finding, we set it out in full, as follows:

“The plaintiffs in said cause having requested me to make a special finding of the facts, with a view to their excepting to the conclusions of law, I find as follows: That on September 26th, 1882, the plaintiffs wrote to E. Pleas & Co. the following letter:

“ ‘E. PLEAS & CO., NEW CASTLE, IND.

“ ‘To R. M. Nixon for above firm:

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“ ‘We will furnish you with one of our two-roller drum job and newspaper presses, No. 6 (page 13), 32x50, with sheet delivery, without tapes, steam fixtures, roller moulds, extra roller sticks, blankets and wrenches, boxed and delivered to L. O. B. cars at Westerly, for \$1,400. Terms, \$300 cash, \$300 monthly in three notes, the last note \$200, with interest, and with your endorsement.

“ ‘Yours truly, C. B. COTTRELL & SONS.
“ ‘DICKINSON.’

“That, on October 24th, 1882, the defendant wrote to the plaintiffs the following letter :

“ ‘NEW CASTLE, IND., 10, 24, 1882.

“ ‘*Messrs. C. B. Cottrell & Co., New York :*

“ ‘GENTLEMEN—Will accept your offer of Sept. 26th for the printing press in question, if shipped in thirty days from this date. Terms as per your letter of 26th ult.

“ ‘Yours, etc., R. M. NIXON.

“ ‘Ship and bill to E. Pleas & Co., New Castle, Ind. Bill through. (over)

“ ‘I will be responsible for the payment, and will see that it is paid for as agreed upon. R. M. NIXON.

“ ‘Refer to McKeeson & Robbins, 91 Fulton St., N. Y.’

“I further find that the plaintiffs shipped to said E. Pleas & Co. the press, and all the property named in said letter above set out, on February 21st, 1883, and that the same was received by E. Pleas & Co., at New Castle, Indiana, on March 15th, 1883; that there yet remains unpaid of the purchase-money for said property the sum of \$400, with the interest thereon from February 21st, 1883, to wit, \$448.76.

“I conclude as a matter of law :

“1st. That the letters aforesaid constituted a contract of sale from plaintiffs to E. Pleas & Co., of the property named therein.

“2d. That the defendant occupied with reference to said contract the place of a guarantor.

“3d. That the property not having been delivered within

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the time specified in the agreement, he is not liable on his guaranty.

"4th. That the law is with the defendant. I therefore find for the defendant."

The plaintiffs excepted to the conclusions of law. They also moved the court to make its findings more certain, and for a *venire de novo*, on the ground that the special finding of facts was too vague and indefinite. These motions were overruled, and judgment was given against the plaintiffs.

The issues tendered by the first paragraph of the complaint required the court to find as a fact whether or not there had been a sale and delivery of the property described to the defendant, and what amount was to be paid, and whether or not anything remained due. The issues tendered by the second paragraph required a finding whether or not the property described had been sold and delivered to E. Pleas & Co., and whether or not, in consideration of such sale and delivery, the defendant had agreed in writing to become responsible for the payment of the purchase-price. Other issuable facts were presented which should have been found specially.

The special finding above set out makes no response whatever to any of the issues presented, except that it finds that the plaintiffs, on a given date, shipped the property mentioned in a certain letter, to E. Pleas & Co., and that the property so shipped was received by the consignee, and that there remains due the plaintiffs \$448.76 from some person not named.

Instead of finding facts, the special finding simply sets out certain letters, which, it says, were written by the parties respectively. The letters thus written, if transmitted to, and received by, the parties to whom they purport to have been written, may have been competent evidence, to prove the fact of a sale and guaranty. But the distinction between finding the evidence and the facts which the evidence may prove, or tend to prove, can not be disregarded. *Kealing v. Vansickle*,

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74 Ind. 529 (39 Am. R. 101); *Hessong v. Pressley*, 86 Ind. 555; *Shannon v. Hay*, 106 Ind. 589.

Whether the plaintiffs sold and delivered a printing press to the defendant, or to E. Pleas & Co., and whether the sale was evidenced by a written contract, were facts which should have been found one way or the other by the court. If it had found that a sale was made, and that the contract of sale was in writing, the contract might with propriety have been made part of the finding by reference to the copy filed with the complaint.

So, also, it was a fact to be found by the court, whether or not the defendant had delivered to the plaintiffs a written promise to pay for the property sold to E. Pleas & Co., if any was sold to them. If it had been found that such a contract had been made and delivered to the plaintiffs, and that in consideration thereof the goods had been delivered, the contract might have been made a part of the finding by reference, or by setting it out in the finding.

In respect to all the material facts in issue, the special finding wholly fails to make any response, except to set out some inconclusive evidence, which may, or may not, have proved the facts in question.

The case is not one for the application of the rule which governs where a special finding is silent in respect to some one or more of the material facts in issue, while other material facts are found upon which conclusions of law are stated.

In such a case, it will be presumed that the issuable facts, upon which the verdict is silent, were not proved. The party having the burden of that issue will be deemed to have failed in respect to the facts upon which the special finding fails to speak.

In the case before us, the finding is rendered so indefinite and uncertain by its omission to find any of the facts, and by injecting into it certain items of evidence instead of ultimate facts, that it is incapable of supporting any conclusions of

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law, or of forming the basis of any judgment on the issues involved in the case.

We are unable to determine upon the facts found, whether the conclusions of law stated by the court were correct or not. Accordingly, we express no opinion in respect to the propriety of the conclusions of law.

For the error of the court in overruling the appellants' motion for a *venire de novo* the judgment is reversed, with costs.

Filed Feb. 3, 1887.

109	383
197	265
109	383
138	181

No. 13,221.

DAY v. BOWMAN ET AL.

ATTORNEY'S LIEN.—*Assignment.*—*Judgment.*—The lien of an attorney for his fees is incident to the judgment to which it is attached, and is assignable.

SAME.—*Complaint to Enforce Lien.*—*Necessary Averments.*—Where it is sought to enforce the lien, the amount due for fees must be shown, either by stating a contract fixing the amount, or by averring the value of the services.

SAME.—*When Lien Must be Entered.*—The lien, to be effectual, must be entered at the time the judgment is rendered.

SAME.—*Sheriff's Sale.*—*Injunction.*—*Pleading.*—*Exhibit.*—A judgment debtor may enjoin a threatened sale of his property under a judgment which is paid, except as to the amount of liens for attorney's fees which he holds by assignment, and a copy of the assignment need not be filed with the complaint for injunction.

From the Wabash Circuit Court.

B. M. Cobb, C. W. Watkins and J. D. Conner, for appellant.

J. H. Mellett, E. H. Bundy, J. Brown and W. A. Brown, for appellees.

NIBLACK, J.—Complaint by Samuel F. Day against John W. Bowman, sheriff of Huntington county, William Conway and William H. Myers, in four paragraphs.

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The first paragraph charged that, on the 11th day of April, 1876, the defendant Conway obtained a judgment in the Huntington Circuit Court against the plaintiffs and one Robert J. Day and the defendant Myers, for the sum of \$2,670; that, on the 8th day of July, 1877, the defendants in that judgment appealed the cause to the Supreme Court; that, on the 20th day of December, 1878, said judgment was affirmed; that, on the 30th day of May, 1879, the said Conway commenced a suit to correct said judgment; that, on the 19th day of June, 1879, judgment in said proceedings was rendered against the said Conway; that, on the 8th day of March, 1882, said last named judgment was reversed by the Supreme Court; that, on the 23d day of January, 1883, the said suit to correct the first named judgment was again tried in the Huntington Circuit Court, and judgment was again rendered against the said Conway; that, on the 23d day of March, 1883, the said Conway again appealed to the Supreme Court where, on the 4th day of January, 1884, said last named judgment was reversed; that, on the 7th day of April, 1884, final judgment was rendered in the Huntington Circuit Court in favor of the said Conway in his suit for the correction of the original judgment; that during all of such litigation James C. Branyan, Charles W. Watkins, Maurice L. Spencer and George W. Stults were the duly employed and acting attorneys for the said Conway, and contributed their time, labor and skill, as well as incurred great expense, in conducting the various proceedings in his behalf; that when the first appeal herein above named was taken to the Supreme Court, the said Branyan and Watkins appeared and acted as attorneys in said court for the said Conway; that, on the 24th day of February, 1879, being the day on which the cause was returned to the Huntington Circuit Court from the Supreme Court, the said Branyan and Watkins entered in the order-book of said circuit court, opposite the judgment from which such appeal had been taken, a notice that they intended to hold a lien on said judgment for the sum

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of \$500 for their services as attorneys concerning said judgment; that the said Stults had already, on the 11th day of April, 1876, the day on which it was rendered, entered on the record of such original judgment a notice of his intention to hold a lien on said judgment for the sum of \$200 for services in obtaining the same; that the said Branyan and Watkins and the said Spencer, on the 7th day of April, 1884, the day on which the judgment correcting the original judgment was rendered, entered on the record of such original judgment a notice of their intention to hold a lien on such judgment for the additional sum of \$200 for services in obtaining a correction thereof; that the services performed by the said Branyan, Watkins and Spencer, were reasonably worth the aggregate sum of \$700, and that all such attorneys' fees remained unpaid; that, on the 23d day of January, 1883, the said Watkins assigned to the said Spencer all his interest in the lien entered for the sum of \$500; that, on the 25th day of March, 1885, the said Branyan and Spencer assigned to the plaintiff, in writing, all their interest in the liens so held and controlled by them, and that, on the same day, the said Stults assigned to the plaintiff, in writing, his lien on the judgment in question; that, on the 3d day of January, 1885, Conway caused an execution to be issued upon the original judgment, rendered as stated, on the 11th day of April, 1876; that there was paid on such judgment, by the sale of the property of the defendants therein, the sum of \$2,850; that the plaintiff has since paid the sum of \$946.49 in money; that the plaintiff has also paid all the costs which have accrued in the cause; that the aggregate amount of the liens for attorneys' fees, so held and owned by the plaintiff, is more than sufficient to offset, pay and satisfy the balance due upon such judgment; that the said Conway has, notwithstanding, caused another execution on such judgment to be issued to the said Bowman, as sheriff of said county of Huntington, who had levied the same on cer-

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The first paragraph charged that, on the 11th day of April, 1876, the defendant Conway obtained a judgment in the Huntington Circuit Court against the plaintiffs and one Robert J. Day and the defendant Myers, for the sum of \$2,670; that, on the 8th day of July, 1877, the defendants in that judgment appealed the cause to the Supreme Court; that, on the 20th day of December, 1878, said judgment was affirmed; that, on the 30th day of May, 1879, the said Conway commenced a suit to correct said judgment; that, on the 19th day of June, 1879, judgment in said proceedings was rendered against the said Conway; that, on the 8th day of March, 1882, said last named judgment was reversed by the Supreme Court; that, on the 23d day of January, 1883, the said suit to correct the first named judgment was again tried in the Huntington Circuit Court, and judgment was again rendered against the said Conway; that, on the 23d day of March, 1883, the said Conway again appealed to the Supreme Court where, on the 4th day of January, 1884, said last named judgment was reversed; that, on the 7th day of April, 1884, final judgment was rendered in the Huntington Circuit Court in favor of the said Conway in his suit for the correction of the original judgment; that during all of such litigation James C. Branyan, Charles W. Watkins, Maurice L. Spencer and George W. Stults were the duly employed and acting attorneys for the said Conway, and contributed their time, labor and skill, as well as incurred great expense, in conducting the various proceedings in his behalf; that when the first appeal herein above named was taken to the Supreme Court, the said Branyan and Watkins appeared and acted as attorneys in said court for the said Conway; that, on the 24th day of February, 1879, being the day on which the cause was returned to the Huntington Circuit Court from the Supreme Court, the said Branyan and Watkins entered in the order-book of said circuit court, opposite the judgment from which such appeal had been taken, a notice that they intended to hold a lien on said judgment for the sum

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of \$500 for their services as attorneys concerning said judgment; that the said Stults had already, on the 11th day of April, 1876, the day on which it was rendered, entered on the record of such original judgment a notice of his intention to hold a lien on said judgment for the sum of \$200 for services in obtaining the same; that the said Branyan and Watkins and the said Spencer, on the 7th day of April, 1884, the day on which the judgment correcting the original judgment was rendered, entered on the record of such original judgment a notice of their intention to hold a lien on such judgment for the additional sum of \$200 for services in obtaining a correction thereof; that the services performed by the said Branyan, Watkins and Spencer, were reasonably worth the aggregate sum of \$700, and that all such attorneys' fees remained unpaid; that, on the 23d day of January, 1883, the said Watkins assigned to the said Spencer all his interest in the lien entered for the sum of \$500; that, on the 25th day of March, 1885, the said Branyan and Spencer assigned to the plaintiff, in writing, all their interest in the liens so held and controlled by them, and that, on the same day, the said Stults assigned to the plaintiff, in writing, his lien on the judgment in question; that, on the 3d day of January, 1885, Conway caused an execution to be issued upon the original judgment, rendered as stated, on the 11th day of April, 1876; that there was paid on such judgment, by the sale of the property of the defendants therein, the sum of \$2,850; that the plaintiff has since paid the sum of \$946.49 in money; that the plaintiff has also paid all the costs which have accrued in the cause; that the aggregate amount of the liens for attorneys' fees, so held and owned by the plaintiff, is more than sufficient to offset, pay and satisfy the balance due upon such judgment; that the said Conway has, notwithstanding, caused another execution on such judgment to be issued to the said Bowman, as sheriff of said county of Huntington, who had levied the same on cer-

tain described real estate belonging to the plaintiff. Wherefore an injunction was demanded.

The other paragraphs of the complaint stated substantially the same facts, except that the third paragraph averred that the respective attorneys for Conway entered on the proper records notices of their intention to hold liens for their fees on the judgments entered in his favor at the time such judgments were respectively rendered, and before the right of any third party had intervened, and that the services for which notices of liens had been so entered were worth the sums severally charged therefor.

In the Wabash Circuit Court, to which the cause was taken on a change of venue from Huntington county, Bowman and Conway severally demurred to each paragraph of the complaint for want of sufficient facts to entitle the plaintiff to any relief, and their demurrers were sustained to all the paragraphs. The plaintiff declining to plead further, final judgment was rendered against him on demurrer.

The only question, therefore, which this appeal presents is, was the complaint, or any of its paragraphs, sufficient as an application for an injunction to restrain the sale of the property levied on by Bowman as herein above set forth?

As to the decisions of this court, referred to in the complaint, see the cases of *Myers v. Conway*, 62 Ind. 474; *Conway v. Day*, 79 Ind. 318; *Conway v. Day*, 92 Ind. 422.

The lien of an attorney for his fees is incident to the judgment to which it is attached, and is necessarily as much assignable as is the judgment to which it is incident. *Sibley v. County of Pine*, 31 Minn. 201 (17 N. W. Rep. 337).

The assignments of the attorneys' liens alleged in the several paragraphs of the complaint were not in any sense the foundation of this suit. They only constituted alleged facts to be proven at the trial, and hence there is no rule of practice which required copies of such assignments to be filed with the complaint.

In an action to enforce a lien in favor of an attorney, the

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amount due for fees must be alleged, either by stating a contract fixing the amount, or averring the value of the services charged for. *Dunning v. Galloway*, 47 Ind. 182; *Adams v. Lee*, 82 Ind. 587.

There being no averment in the first paragraph of the complaint as to the value of the services performed by Stults, that paragraph was bad as to the lien held by assignment from Stults.

To make the lien of an attorney on a judgment effectual, it must be entered at the time the judgment is rendered. R. S. 1881, section 5276; *Blair v. Lanning*, 61 Ind. 499.

As has been seen, it was alleged in the first paragraph of the complaint, that Branyan and Watkins did not enter their first notice of lien until the 24th day of February, 1879, nearly three years after the judgment, to which it was intended to apply, was rendered; hence the paragraph of complaint in question was also bad as to that alleged lien.

The third paragraph of the complaint having alleged that the notices of the liens were entered at the times the judgments to be thereby affected were respectively entered, and that the services performed were worth the amounts impliedly demanded by such notices of liens, we see no objection to its sufficiency upon demurrer, and therefore feel constrained to hold that the court below erred in sustaining the demurrer to that paragraph.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

Filed Feb. 4, 1887.

Clark v. The State, *ex rel.* Alexander, Auditor.

No. 12,730.

CLARK v. THE STATE, EX REL. ALEXANDER, AUDITOR.

SCHOOL FUND.—*Sale by County Auditor of Mortgaged Land.—Suit for Deficiency.—Statute Construed.*—A county auditor who bids in, at public auction, land mortgaged to the school fund, can not proceed on the note executed by the mortgagor until he has made the subsequent sale required by section 4393, R. S. 1881, and fails to realize enough to satisfy the amount due.

From the Monroe Circuit Court.

R. A. Fulk, for appellant.

W. P. Rogers and *J. E. Henley*, for appellee.

MITCHELL, J.—The auditor of Monroe county commenced this suit to recover on a note bearing date April 3d, 1875, executed by the appellant to the State of Indiana, for the benefit of the common school fund.

By way of answer the defendant set up, that, as a part of the transaction, he had executed a mortgage to the State of Indiana to secure the payment of the note, which mortgage conveyed to the State the tract of land therein described. On the 24th day of March, 1879, the note having matured, and the principal and some accumulated interest remaining unpaid, the county auditor, pursuant to proper notice, offered the mortgaged premises for sale at public auction. Failing to receive a bid for the amount due, it is averred, the auditor bid in the land for the full amount, including principal, interest, damages and costs, and that, on behalf of the State, he thereupon took, and has ever since remained in possession of the land.

The court sustained a demurrer to the answer, and the appellant refusing to plead over, judgment was rendered against him for the amount of the note, including interest and costs.

No question is made concerning the regularity of the sale, the sole contention being whether or not, since the auditor

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bid in the land, he can, while holding that, pursue any other remedy against the appellant on the note.

Under section 4393, R. S. 1881, it becomes the duty of the county auditor, in case no bid for the amount due is received on offering land for sale in order to realize a debt due the common school fund, to bid the land in on account of the fund, and as soon thereafter as may be, he is required to cause the land to be appraised, and to sell the same on a credit of five years, at seven per cent. interest, payable annually in advance, for a sum not less than the appraised value. If upon such sale more is realized than is sufficient to pay the principal, interest, damages, and costs, the fair implication of section 4394 is, that the overplus shall be paid to the original mortgagor, his heirs or assigns. If less is realized, then, under section 4390, the county auditor is required to bring suit on the note or notes executed by the mortgagor. Section 4390 reads as follows: "In all cases when the mortgaged premises shall fail to sell for a sum sufficient to satisfy the principal and interest of the loan made, and the damages accrued by reason of such failure, and costs, the county auditor shall bring suit on the notes executed by the mortgagor," etc.

The appellee's argument in support of the ruling below proceeds upon the theory that this section relates to the sale of the land at public auction in the first instance.

The fallacy of this argument becomes apparent from a consideration of sections 4392 and 4393. While the auditor may at such auction sale sell less than the whole amount of the land mortgaged, he can receive no bid for less than the whole amount of the debt due, including principal, interest and costs. *Shannon v. Hay*, 106 Ind. 589.

Since, therefore, the sale of the mortgaged premises, at auction, can never occur, except upon the condition that a bid for the whole amount due is received, section 4390 can have no application to such sales.

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If at such attempted sale no bid for the full amount due is made, the auditor is required to bid in the land, and whether he bids it in for much or little, is of no consequence, since in any event it becomes his duty to cause the land to be appraised and sold, and the proceeds to be disposed of as provided in sections 4393 and 4394.

Bidding the land in by the auditor, under section 4393, operates as a strict foreclosure of the mortgage, and vests the title in the State, without any deed, as provided in section 4397.

It does not, however, affect the debt, whether the bid of the auditor be one sum or another. The debt remains, and is satisfied or not, owing to the amount received by the auditor when he subsequently sells the land under the provisions of section 4393. If more is realized at such subsequent sale, the debt is satisfied, and the excess goes to the mortgagor, his heirs or assigns. If less, then the auditor may proceed upon the note. The county auditor can not, however, proceed upon the note until such subsequent sale be made.

As a plea in bar the answer was clearly insufficient, but, while it is somewhat difficult to determine the precise theory upon which it was drawn, we have concluded, after some hesitation, that it states facts sufficient to make it good as a plea in the nature of a plea in abatement.

The judgment is reversed, with costs, with directions to the court below to overrule the demurrer to the answer, and for further proceedings not inconsistent with this opinion.

Filed Feb. 4, 1887.

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13,409.

GLOVER v. THE STATE.

CRIMINAL LAW.—*Accepting Bribe.—Indictment.—Sufficiency of.*—An indictment which charges that the defendant was a township trustee, and *ex officio* trustee of a school township; that as such trustee it was his duty to contract for, purchase and furnish to the school township, for its use, furniture, materials and supplies; that while holding said office he unlawfully, feloniously and corruptly accepted from one P. the sum of \$3,500 in money as a bribe and to influence him, the said defendant, in the discharge of his official duties, and that he was influenced as such officer, by the acceptance of said sum of money, to enter into a contract with said P. for the purchase from him, in behalf of and for the use of such school township, of a large amount of school furniture, material and supplies, to the amount, price and value of \$10,000, is sufficiently explicit under section 2009, R. S. 1881.

SAME.—*Immaterial Averments.*—In such case the *gravamen* of the offence is the acceptance of money to influence the official action of the defendant in contracting for and purchasing the supplies, and an averment in the indictment as to the amount, quality or description of the property contracted for or purchased, is entirely unnecessary.

SAME.—In such case an allegation in the indictment, that the person giving the bribe did so with the intent of inducing the defendant to do some act to favor and aid such person, is unnecessary, it being an immaterial question as to whether the giver of the bribe was profited or not.

SAME.—*Township Trustee.—Bribery of.—Defence.*—In a prosecution against a township trustee, *ex officio* trustee of a school township, under section 2009, R. S. 1881, for accepting a bribe to influence him in his official action, and for entering into a contract for supplies in pursuance of such bribe, it is no defence that such contract was void and not enforceable against the township.

SAME.—*Indictment.—Duplicity.—Motion to Quash.*—When, from an inspection of the indictment, it is not certain that different and distinct felonies, which can not be joined, are charged in the different counts, a motion to quash, on account of duplicity, should be overruled.

SAME.—*Election by Prosecuting Attorney.—When not Required.—Discretion of Trial Court.*—The question as to whether or not the prosecuting attorney should be required to elect and designate the count of the indictment upon which he will proceed, is a matter largely in the discretion of the trial court, and when it is not apparent on the face of the indictment that different and distinct offences, which can not be properly joined, are charged, an election should not be required.

109	391
132	429
109	391
147	43
109	391
156	66
109	391
157	446

109	391
160	668
109	391
164	236

109	391
169	507

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SAME.—Evidence.—Admissions.—On the trial of a defendant charged with having accepted a bribe, as trustee of a school township, and with having been influenced thereby to make purchases of school supplies, etc., in payment of which township warrants were by him issued, where an admission of the defendant is proved, that a certain letter received by him as such trustee, from a third party, contained a correct list of township warrants issued by him, and that they were so issued and delivered, in consideration of money received by him, such letter is admissible in evidence.

SAME.—Evidence.—In such case it is not material whether the money was paid over to the defendant before or at the time he entered into the contract, or issued the warrants. It is sufficient if he received the money afterwards in pursuance of a prior arrangement and agreement.

INSTRUCTIONS TO JURY.—Signature of Party.—Practice.—It is not error to refuse to give instructions to the jury, which are not signed by the party asking them.

From the Fountain Circuit Court.

G. W. Paul, J. E. Humphries and W. M. Reeves, for appellant.

T. F. Davidson and H. H. Conley, Prosecuting Attorney, for the State.

ZOLLARS, J.—Appellant was township trustee, and *ex officio* trustee of the school township. He was convicted upon a charge of having accepted money as an inducement and bribe to enter into a contract, as such trustee, for the purchase of school furniture and supplies, for the use of the township. There were, originally, seven counts in the indictment.

The court sustained a motion to quash as to the fifth, and overruled it as to the others. That ruling is assigned as error. The objections urged, in argument, are not to any particular count, but to each and all, upon the assumption that if one of them is bad, all are bad, and that if one is good, all are good.

Adopting that assumption as being correct, we pass to the objections to the indictment, specifically pointed out. This prosecution, as indicated by the indictment, is based upon section 2009, R. S. 1881. The first portion of the section makes it a crime for any person to corruptly give, or offer to

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give, to any State or other officer, any money or valuable thing to influence his action in any matter pending, or that may legally come before him. The latter portion is, in substance, that whoever, holding any office of trust or profit under the laws of this State, solicits or accepts any such money or valuable thing, to influence him with respect to his official duty, or to influence his action in any matter pending, or that may legally come before him, shall, upon conviction thereof, be imprisoned in the State prison, etc.

It is charged in the indictment, that appellant was a township trustee, and *ex officio* trustee of the school township; that as such trustee, it was his duty to contract for, purchase, and furnish to the school township, for its use, school furniture, materials and supplies; that on the 5th day of September, 1885, while holding the office of trustee of the school township, and acting as such, he unlawfully, feloniously, and corruptly, accepted from one Pollard the sum of \$3,500 in money as a bribe, and to influence him, appellant, as such trustee, in the discharge of his duties as such trustee, and that he was influenced, as such trustee, by the acceptance of the money, to enter into a contract with said Pollard for the purchase from him, in behalf of, and for the use of the school township, of a large amount of school furniture, material and supplies, to the amount, price and value of \$10,000.

As we understand the brief of appellant's counsel, three objections, and only three, are urged to the indictment. The first is, that there is no statement of the kind of furniture purchased; that the terms of the contract are not specifically stated; that, hence, it is not shown how or wherein appellant was bribed, or influenced; and that it does appear that he was not improperly influenced, because the furniture, etc., contracted for, was worth all he gave, or agreed to give, for it.

It is not particular as to the kind of property purchased. The purchase of the property is not the gravamen of the offence, as defined by the statute.

It is entirely immaterial as to the amount, quality, or de-

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scription of the property contracted for and purchased. That which the statute prohibits, and declares to be a crime, is the soliciting or accepting of money or other valuable things by the trustee to influence him with respect to his official duty, or to influence his action in any matter pending, or that may legally come before him.

It is not a crime for a trustee of a school township to purchase school furniture for, and on behalf of, the corporation; but it is a crime to accept money to influence him to enter into such a contract, or make such a purchase.

The vital charge presented by the indictment, to be met by appellant, was, that he had accepted money to influence his official conduct.

If he could meet that charge he would overthrow the case against him. And to enable him to meet that charge, it was not necessary that he should be furnished with a detailed list of the articles contracted for and purchased, nor that he should be informed of the specific terms of the contract. He may have paid the full amount in cash, out of the township funds; he may have issued certificates of indebtedness, payable at different times, or he may have purchased the articles with a warrant; but, manifestly, none of these supposed terms or conditions could be important or material to him in preparing for or making his defence. Nor does it make any difference that the furniture, etc., contracted for or purchased, was of the value agreed upon. It may be as great an injury to the township to purchase a large amount of furniture, etc., not needed, as to pay for a proper amount more than it is worth.

Did appellant accept the money to influence his official action, in contracting for, and purchasing the furniture, etc.? That is the question to be settled. If he did, he is guilty under the statute, without regard to the particular articles of the purchase or the terms of the contract.

We may as well notice here an argument urged as a reason why the motion for a new trial should have been granted. It

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is argued, that because the contract for the purchase of the furniture is not shown to have been in writing, it must be assumed that it was not; that not being in writing, under the statute of frauds, it could not be enforced, and that, therefore, appellant could not be guilty of the crime defined by the statute, upon which this prosecution is based.

It is not material whether the contract entered into could have been enforced against the township or not.

If it was already executed, and the amount paid out of the township funds, of course it could not be material whether or not the contract was in writing. Nor could it be material in any event. The question is not whether appellant entered into a contract binding upon the township, but whether he accepted the bribe.

If he did, he can not be heard to say that the contract was not enforceable against the township. If he did, he is guilty of the crime defined by the statute. *Shircliff v. State*, 96 Ind. 369; *State v. McDonald*, 106 Ind. 233; *Woodward v. State*, 103 Ind. 127.

It is insisted, in the second place, that the indictment is bad, because it is not specifically averred therein that Pollard gave the money to appellee, with the intent of inducing him to do some act to favor and aid him, Pollard. We do not think such an averment is necessary.

The case of *Hutchinson v. State*, 36 Texas, 293, cited by counsel, is not authority here, for the reason that the case arose under a statute very different from that upon which this prosecution rests.

From all the facts stated in the indictment before us, the inference is irresistible, that Pollard, or some one for whom he was acting, was to, and did, profit by the arrangement with appellant.

Such an inference is not material or important here, nor is it essential that aid or profit to Pollard, or those for whom he may have acted, should be charged. It is a crime under the statute for a township trustee to solicit or accept money

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to influence his official conduct, whether those from whom it is solicited or received are profited or not. The indictment is not as specific and formal, in some respects, as the rules of good pleading require, but, taken as a whole, the offence is charged, substantially, in the language of the statute, and plainly enough informed appellant of the crime with which he was charged. R. S. 1881, sections 1755, 1756; *State v. Anderson*, 103 Ind. 170, and cases there cited; *Myers v. State*, 101 Ind. 379, and cases there cited; *Malone v. State*, 14 Ind. 219; *Marble v. State*, 13 Ind. 362.

It is finally contended, in the third place, that the motion to quash should have been sustained, because different counts in the indictment charge distinct and different offences.

In one of the counts, it is charged that appellant accepted \$3,500 from one Pollard, and was induced by such acceptance to contract with him for, and purchase from him, school furniture, etc., for the township.

In another count, it is charged that appellant accepted from one Davis the same amount of money, and by such acceptance was induced to contract for, and purchase from him, the same amount of school furniture.

The dates, the amounts accepted, and the amounts of the school furniture, etc., are the same in each count. The difference is, that where the name of Pollard is used in some of the counts, the name of Davis is used in others.

It is not certain, from an inspection of the indictment, that the several counts do not, in different modes, charge the same offence, growing out of the same transaction. There are, doubtless, cases where the court will, and ought to, quash an indictment, where different and distinct felonies, and such as can not be joined, are charged in different counts of an indictment. But those are cases where it is made certain from an inspection of the indictment, that different and distinct felonies, which can not be joined, are charged in different counts, and that the same offence is not charged in the several counts in different modes.

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Whether or not an indictment will be quashed for the reason that different felonies are charged in different counts, is much in the discretion of the court, for the reason that it is often difficult to determine from an inspection of the indictment, whether such distinct and different felonies are so charged; for the reason that the prosecutor may inform the court in advance that but one offence is charged, and that he will ask a conviction for but one crime; for the reason that the court may compel the prosecutor to elect upon which count he will proceed, and for the reason that the court has the case within its control, and may compel the prosecutor to elect, after the evidence may have developed the fact that the felonies charged in different counts are different and distinct, and such as can not be joined in one indictment. See *Long v. State*, 56 Ind. 182 (26 Am. R. 19); *Mills v. State*, 52 Ind. 187; *Griffith v. State*, 36 Ind. 406; *Bell v. State*, 42 Ind. 335.

In the case last above cited, the statement was approved, that the joinder is a matter of prudence and discretion, resting with the judge to exercise. See, also, *McGregor v. State*, 16 Ind. 9; *Gandolph v. State*, 33 Ind. 439.

Mr. Bishop, in his work on Criminal Procedure, volume 1, at section 425, says: "When the court, on seasonable application, deems that the due order of judicial proceedings, or the interests of a party, will be prejudiced by the multiplicity or ill joinder, it will in its discretion quash a count or the whole indictment, or order separate trials on the counts, or compel the prosecutor to elect on which one he will ask for a verdict, as the exigencies of the particular case and the time and manner of making the objection may render most suitable. The fact that the court will interfere to prevent an abuse of the right of joining counts is the justification of the various expressions in the books to the effect, that such or such a joinder is permissible and such another not." See, also, 1 Bishop Crim. Pro., section 446, *et seq.*

In the case of *Hamilton v. People*, 29 Mich. 173, in speak-

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ing of a misjoinder in an indictment, and a motion to quash on that ground, it was said: "Such a motion is addressed to the discretion of the court. It ought to be granted where the confusion is such that it is likely to interfere with the means of defending, by misleading or perplexing the prisoner in meeting the case or preparing for trial. But when the court can prevent any mischief, as it usually can, by confining the proof to the single transaction, * * * on which the prosecution has opened the testimony, or by compelling an election in the outset, no wrong is done by the refusal to quash. We do not hold that, under our statutes, requiring a motion to quash in lieu of a motion in arrest or to save a ground of error, such a motion is always discretionary. But such a motion for misjoinder appears to be discretionary. 1 Bishop Crim. Proc., section 447; *The King v. Kingston*, 8 East, 41."

In the case of *McGregg v. State*, 4 Blackf. 101, this court quoted with approval the following, taken from an opinion by Justice BULLER: "On the face of an indictment, every count imports to be for a different offence, and is charged as at different times. And it does not appear on the record, whether the offences are, or are not, distinct. But if it appear before the defendant has pleaded, or the jury are charged, that he is to be tried for separate offences, it has been the practice of the judges to quash the indictment, lest it should confound the prisoner in his defence, or prejudice him in his challenge of the jury. * * * But these are only matters of prudence and discretion. If the judge who tries the prisoner, does not discover it in time, I think he may put the prosecutor to make his election on which charge he will proceed." See *McGregor v. State*, 16 Ind. 9; *Engleman v. State*, 2 Ind. 91; *Maynard v. State*, 14 Ind. 427.

Inasmuch as the prosecutor may be put to an election as to which count he will ask a conviction upon, it seems reasonable that in no case should an indictment be quashed because of misjoinder, unless it clearly appears, upon the face of the indictment, that different and distinct crimes are

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charged in different counts, which can not be joined in the same indictment; and unless the prosecutor declines to elect, and manifests a purpose to insist upon a conviction upon each count.

In the case before us, it can not be definitely determined by an examination of the indictment, that different and distinct crimes, which may not be joined in the same indictment, are charged in the different counts.

It can not be determined from such an examination, that the statements in the different counts are not simply different modes of statement, to meet the possible proof. And for aught that appears from the record, the prosecutor may have announced to the court in advance, that he should confine his proof to but a single transaction, out of which the crime charged arose. In short, the record does not show that the action of the court below, in overruling the motion to quash, in any way prejudiced the rights of appellant.

It is further contended by appellant, that he requested the court to require the prosecuting attorney to elect and designate the count of the indictment upon which he would proceed, and that the court refused the request, to his prejudice. Here, again, the record shows nothing which makes it apparent that the court should have granted the request, and required such an election on the part of the prosecuting attorney.

In the first place, it does not appear that distinct and different crimes, that might not have been joined in the same indictment, are charged in the different counts.

In the second place, whether or not such an election will be ordered, is a matter largely within the discretion of the trial court.

In the case of *McGregg v. State, supra*, it was said: "Where there are two or more counts for apparently distinct felonies, as there legally may be in many instances, it can not be a matter of course, as the plaintiff in error contends it is, for the defendant to compel the prosecutor to elect on which single count he will go to trial. If that were the case, it would at

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once render nugatory the established and legal practice of inserting several counts in an indictment for felony. There could be no possible use in inserting several counts, if the defendant could, in effect, have them all but one struck out of the indictment. The truth is, the different counts in an indictment for felony, are usually drawn with a view to one and the same transaction; and the object of inserting several counts is, that some one of them may be found, on the trial, to be in accordance with the evidence. * * It sometimes happens, no doubt, that the prosecutor's object in inserting several counts, is really to prosecute the defendant for *separate* felonies by means of one indictment. This he has no right to do, and when it is ascertained before the trial that he intends to do it, the court will defeat his design. But to enable the defendant to defeat the prosecutor's intention of trying him for separate offences, it lies upon the defendant to show the existence of such an intention. It was the want of proof of such intention which prevented the prisoner, in the case before us, from obliging the prosecutor to elect upon which of the counts in his indictment he would rely. The prisoner rested his motion on the single fact, that there were several counts in the indictment; but that circumstance was no evidence, of itself, that the prosecutor's object was to prove separate offences. * * * It does not appear by the record before us, that the court was furnished with any information, independently of the indictment, that separate offences were to be tried."

We have quoted thus copiously from the above case, because what was there said is applicable and pertinent here. See, also, *Short v. State*, 63 Ind. 376; *Snyder v. State*, 59 Ind. 105; *Bell v. State*, 42 Ind. 335; *Engleman v. State*, 2 Ind. 91; *State v. Dufour*, 63 Ind. 567; Moore Crim. Law, sections 189, *et seq.*, and cases there cited; 1 Bishop Crim. Pro., section 455.

There is another reason why appellate courts should not be swift to reverse judgments in criminal cases on account of

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a refusal by the trial court to put the prosecutor to an election, and that is, that that court may, when justice requires it, compel an election after it may be developed by the evidence that the different counts in the indictment charge different and distinct offences, which can not be joined in the same prosecution. *Long v. State*, 56 Ind. 182.

There was no error in overruling the motion to quash, and the motion for an order upon the prosecutor to elect to proceed upon some particular count of the indictment.

The evidence too shows clearly, that the purpose was to charge but a single offence in different modes, and that appellant was prosecuted but for a single offence. The whole record shows too, that he was in no way injured by the refusal of the court to quash the indictment on account of the different modes in which the crime was charged, nor by the refusal of the court to order an election by the prosecutor.

What we have said, disposes of some of the questions argued by counsel as having been presented by appellant's motion for a new trial.

It is urged that there was no evidence that appellant received \$3,500, as an inducement to enter into a contract for the purchase of \$10,000 worth of school furniture. It is not material whether he received the exact amount of \$3,500, nor that he contracted for exactly \$10,000 worth of school furniture. As we have before stated, the gravamen of the offence defined by the statute is the receiving of money by an officer to influence him with respect to his official duty.

The evidence is abundant, that appellant received from Pollard \$3,000, and, in consideration therefor, issued orders against the township for thousands of dollars, as for school furniture, and for which the township received but little, if any, consideration, and that some of the orders passed into the hands of Davis. Having received the money as a bribe, and having violated his official duty in consideration thereof, appellant is guilty of the crime defined by the statute, whether

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any furniture was furnished to the township or not. He is not in a very favorable position to contend that he shall go acquit, because it is not shown that the township received value for the fraudulent debts which he contracted through bribery and official dishonesty.

Over appellant's objections, the court admitted in evidence a letter from Davis Bros., of Chicago, to him, as township trustee, asking him whether he had signed certain warrants against the township, giving a list, with the dates, amounts, and when due, and requesting an answer to be endorsed upon the statement, and that, as thus endorsed, the statement should be returned.

That paper, in connection with the testimony of the witness Bingham, was competent evidence.

One of the questions in the case was, whether appellant had done any official act in consideration of the money received from Pollard.

The paper or letter from Davis Bros. contained a list of township warrants issued by appellant as township trustee, amounting to about \$9,000.

That statement appellant showed to Bingham, and told him that it was a correct statement of the orders he had issued and delivered to Pollard, and that they were so issued and delivered in consideration of the money he had received from Pollard.

The paper was competent evidence, not as a statement from Davis Bros., but because appellant adopted the statement of the warrants thereon as his statement of the warrants which he had dishonestly issued.

Appellant, through his counsel, also contends that the court below erred in allowing the witness Bingham to testify to the contents of a written contract between him and Pollard, for the purchase of \$2,200 worth of school furniture.

For the testimony of the witness as to the contents of the contract, we are referred to the record, from page 56 to page 159, with the statement that "the contract spoken of by the

witness forms a large part of the evidence." This reference and statement, with the further statement that the witness was allowed to give the contents of the contract, is the sum of the argument upon the alleged error of the court in admitting the testimony.

No particular page or pages of the record are pointed out, where the objectionable evidence may be found. Neither the brief, upon the alleged error, nor the reference to the record, is in compliance with the rules of this court. As counsel have not referred us to any particular page or pages, where the objectionable testimony may be found, we assume that they do not regard it as of much importance.

It is still further contended by appellant's counsel, that the court erred in refusing instructions asked by appellant. This contention is met by counsel for the State with the contention on his part, that there is no available error in the refusal, because the instructions were not signed by appellant or his counsel.

The instructions do not appear to have been so signed, and hence we can not disregard the contention of counsel for the State, without disregarding the statute and former decisions by this court based upon and construing the statute. *R. S. 1881, sections 533, 1823; Chicago, etc., R. R. Co. v. Hedges*, 105 Ind. 398; *Hutchinson v. Lemcke*, 107 Ind. 121; *Beatty v. Brummett*, 94 Ind. 76.

The objections made to the first instruction given by the court are, that therein the court told the jury that appellant was charged with having accepted money from Pollard to influence his, appellant's action, in relation to issuing certain orders of the township. It is said by appellant's counsel, that in one of the counts he was charged with having received the money from Davis, and that, therefore, the instruction is erroneous. It is difficult to see how appellant could be injured by an instruction which limits the scope of the charge against him. It is true, that it is not charged in terms in the indictment, that appellant accepted the money

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to influence his action in relation to issuing township orders, but it is charged that he received it as a bribe to influence him in the discharge of his official duty as township trustee, and to influence him to enter into a contract for the purchase of school furniture.

The jury had the indictment before them, and it can not be said that the instruction, in connection with other instructions given by the court, misled the jury as to the issue to be tried. And if it was shown by the evidence, that appellant accepted the bribe from Pollard, to influence him to issue fraudulent township warrants, on the pretence of purchasing school furniture, he might be convicted under the indictment charging him with having accepted the money to influence his official action, and to influence him in making a purchase of school furniture.

As we have before stated, the important thing, and the gravamen of the offence, is the accepting of the money to influence his official action. It was not material that the money should have been paid over to appellant before he entered into a contract, or issued the warrants. It plainly enough appears from the evidence, that if the money was not received by appellant before or at the time the arrangement was made between him and Pollard, it was received very soon thereafter, and in pursuance of their arrangement and agreement.

We are satisfied from an examination of the whole record, that the case was fairly tried, and that, considering the case as made by the evidence, the jury were very lenient with appellant in fixing his imprisonment at but two years.

It is very clearly a case where the judgment should not be reversed upon technical errors.

Judgment affirmed.

Filed Feb. 5, 1887.

The Western Union Telegraph Company v. Swain.

No. 12,876.

THE WESTERN UNION TELEGRAPH COMPANY v. SWAIN.

109 405
0157 44

TELEGRAPH COMPANY.—*Penalty.*—*Negligence.*—*Act of 1885.*—No penalty is recoverable under the act of April 8th, 1885, concerning telegraph companies, for a mere negligent omission to transmit a message.

From the Wayne Circuit Court.

J. E. McDonald, J. M. Butler and A. L. Mason, for appellant.

A. C. Lindemuth, for appellee.

MITCHELL, J.—An act approved April 8th, 1885, “prescribing certain duties of telegraph and telephone companies, prohibiting discrimination between patrons,” etc., provides that every telegraph company, with a line of wires wholly or partly within this State, shall during the usual office hours receive and transmit dispatches with impartiality and in good faith, and in the order of time in which they are received, and shall in no manner discriminate between any of its patrons, etc. A violation of any of the provisions of the act renders the person or company liable to any party aggrieved in a penalty of \$100.

On the 5th day of December, 1885, the appellee, Albertus Swain, commenced an action in the Wayne Circuit Court against the appellant for the recovery of the prescribed penalty. A recovery was had according to the prayer of the complaint.

It is assigned for error here, that the complaint does not state facts sufficient to constitute a cause of action.

After the proper formal allegations, the complaint charges that, on the 19th day of October, 1885, the appellee delivered to the appellant’s agent at Richmond, Indiana, a certain telegraphic dispatch addressed to William A. Hallett, at Neosho, Missouri, accompanying the message with the charges demanded for its transmission, but that the “defendant wholly failed and neglected to transmit said telegraphic message to said Hallett.”

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It thus appears that the default charged against the company was its negligent failure to transmit the message delivered to it to the person to whom the dispatch was addressed. For such a default simply, the statute above referred to imposes no penalty. The statutory duty as respects telegraph companies is to transmit messages with impartiality and in good faith, and in the order of time in which they are received, without discrimination. The statutory penalty is incurred when its acts or omissions are characterized by, or result from, partiality or bad faith, or when it postpones messages out of the order of time in which they are received, or when it discriminates in rates charged or in the manner and conditions of service between its patrons. Each and all of the acts which involve the company in penal consequences, proceed from some aggressive violation of statutory duty imposed, and not from a mere negligent omission to act according to the obligation of its contract as a public carrier of messages.

Section 4176, which is superseded by the act of April 8th, 1885, imposed a penalty, "in case of failure to transmit, or if postponed out of such order, * * * to be recovered by the person whose dispatch is neglected or postponed."

A broad difference is at once apparent between the statute now in force, and that which preceded it, on the same subject. Being highly penal in character, it is to receive such a construction as not to involve penal consequences, except when the act complained of is clearly within the prohibition of the statute. *Western Union Tel. Co. v. Steele*, 108 Ind. 163; *Western Union Tel. Co. v. Wilson*, 108 Ind. 308.

Since the complaint charges a merely negligent omission of duty without more, it fails to bring the case within the consequences of the statute. The first assignment of error is well made.

The judgment is reversed; with costs.

Filed Jan. 28, 1887.

Shannon v. The State.

No. 13,419.

109	407
1188	168

SHANNON v. THE STATE.

CRIMINAL LAW.—*Forgery.*—*Indictment.*—*Uncertainty.*—A written instrument, reading, "September 4, 1886. Mr. T. Hemphill: Please let Charles Shannon have one dress pattern, and oblige (signed) Theodore Points," is so uncertain that the averment of extrinsic facts, showing its fraudulent tendency, is necessary to the sufficiency of an indictment charging forgery.

From the Fountain Circuit Court.

L. Nebeker and *H. H. Dochterman*, for appellant.

L. T. Michener, Attorney General, and *J. H. Gillett*, for the State.

Howk, J.—In this case the indictment charged, "that Charles Shannon, on the 4th day of September, 1886, at and in the county of Fountain and State of Indiana, did then and there unlawfully, falsely, feloniously and fraudulently utter, publish and pass to one Thomas Hemphill, as true and genuine, a certain false, forged and counterfeit order, purporting to have been made and executed by one Theodore Points, for the payment and delivery of property, to wit, one dress pattern, to the said Charles Shannon, he, the said Charles Shannon, then and there knowing that said order was false and forged, which said false, forged and counterfeit order is as follows, to wit:

"September 4, 1886.

"*Mr. T. Hemphill*—Please let Charles Shannon have one dress pattern, and oblige

THEODORE POINTS.'

"That the words and letters, 'Mr. T. Hemphill,' in said false, forged and counterfeit order aforesaid, then and there mean, and were by him, the said Charles Shannon aforesaid, meant, and intended to mean, as follows, to wit, 'Mr. Thomas Hemphill;' that he, the said Charles Shannon, did utter, publish and pass said false, forged and counterfeit order as aforesaid, with intent then and there and thereby to feloniously and fraudulently prejudice, damage and defraud the

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said Thomas Hemphill, contrary to the form of the statute," etc.

Appellant's motion to quash the indictment was overruled by the court, and upon his arraignment he answered in two paragraphs, as follows :

1. A plea that he was not guilty, as charged in the indictment ; and,

2. He averred that, at the time of the alleged uttering and passing of said forged and counterfeit order or instrument, set out in the indictment, he was a person of unsound mind.

The cause was tried by a jury, and a verdict was returned finding appellant guilty as charged, and assessing his punishment at confinement in the State's prison for the period of five years, and a fine in the sum of ten dollars. Over appellant's motion for a new trial, the court rendered judgment against him upon and in accordance with the verdict.

In this court errors are properly assigned by appellant, which call in question the overruling (1) of his motion to quash the indictment, and (2) of his motion for a new trial ; and these errors we will consider in their order, and decide the several questions thereby presented.

1. The motion to quash the indictment was in writing, and it assigned two grounds of objection to the sufficiency of the indictment, namely : 1. That the facts stated therein did not constitute a public offence ; and 2. That the indictment did not state the offence with sufficient certainty. These are two of the four statutory causes, for either of which causes, when apparent upon the face of the indictment, the defendant may move to quash. Section 1759, R. S. 1881.

Appellant's counsel earnestly insist that the indictment herein was not good, and the motion to quash it ought to have been sustained, for two reasons, namely :

"*First.* The instrument set out is not such an 'instrument of writing,' of which forgery, under our statute, can be pred-

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icated ; and, as a necessary sequence, of which a charge of uttering or passing, as forged, can be predicated.

"*Second.* If such an instrument could be made the subject of a charge of forgery, or the subject of a charge of uttering a forged instrument, it could only be done by averment of extrinsic facts, showing the fraudulent tendency of the instrument, in view of the facts connected with its forgery or passing."

We will consider these two reasons, urged against the sufficiency of the indictment herein, in the order of their statement, and of their presentation and discussion here by appellant's learned counsel.

In the indictment under consideration, the offence charged or intended to be charged, against the appellant, is defined, and its punishment prescribed, in section 2206, R. S. 1881. In this section it is thus provided : " Whoever falsely makes or assists to make, defaces, destroys, alters, forges, counterfeits, prints, or photographs, or causes to be falsely made, defaced, destroyed, altered, forged, counterfeited, printed, or photographed, * * * any order, warrant, or request for the payment of money, * * * or any other instrument of writing, with intent to defraud any person, body politic or corporate, or utters or publishes as true any such instrument or matter, knowing the same to be false, defaced, altered, forged, counterfeited, falsely printed, or photographed, with intent to defraud any person, body politic or corporate,—shall be imprisoned," etc.

We have heretofore given an exact copy of the instrument of writing, on which the indictment against appellant is predicated. It is clear that such instrument was not one of those specifically mentioned in our statute defining the crime of forgery. But the law is that forgery may be committed of any instrument of writing which, if genuine, would or might operate as the foundation of another man's liability, or the evidence of his right. 3 Greenl. Ev., section 103 ; *Commonwealth v. Ray*, 3 Gray, 441.

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In *Garmire v. State*, 104 Ind. 444, this court said: "The rule unquestionably is, that the indictment must show that the instrument is one having some legal effect, but it is not necessary that it should be shown to be a perfect instrument. 2 Bishop Crim. Law, section 533; *Reed v. State*, 28 Ind. 396."

If, in the case in hand, the instrument of writing, on which the indictment is predicated, purported to create a pecuniary obligation or liability upon another man, or would operate as evidence of a right of another man, or if, without reference to extrinsic facts, it appeared that such instrument was calculated to have some legal effect, it would be clear, we think, that the *first* reason of appellant's counsel, for claiming that such indictment was not good, is not well assigned and ought not to be sustained. *Harding v. State*, 54 Ind. 359; *Powers v. State*, 87 Ind. 97; *Myers v. State*, 101 Ind. 379.

We can not say from the written instrument in this case, whether, if genuine, it would or would not operate as the foundation of another man's liability, or as evidence of another man's right; whether it would or would not so operate, depended upon facts which were not apparent, and were not averred in the indictment. *Trout v. State*, 107 Ind. 578.

Here lies the difficulty, as it seems to us, with the indictment under consideration; it does not state the offence with sufficient certainty. This is the fourth statutory cause for quashing an indictment, and it was the second ground assigned in appellant's written motion to quash the indictment against him. In such indictment, the instrument of writing, upon which the charge of forgery was predicated, was set out at length. This instrument is so uncertain in its terms, that it can not be said, from merely reading it, what effect, if any, should or can be given thereto. In such a case, it is settled by our decisions, that the extrinsic facts connected with the uttering and passing of the false and forged instrument, as charged, must be averred in the indictment, so that the court may judicially see the fraudulent tendency of the instrument. *Reed v. State*, *supra*; *Powers v. State*, *su-*

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pra. In the indictment we are considering, no extrinsic facts are averred, which show or tend to show the fraudulent tendency of the instrument, or which explain or remove the apparent uncertainties therein. The subject of the order, "one dress pattern," was uncertain in that it was not apparent whether it meant, or was intended to mean, sufficient material out of which to make a dress, or a pattern whereby to cut out a dress in accordance with fashion. The purpose of the request, whether it was the loan or the sale of one dress pattern, was uncertain and was not shown by any averment in the indictment. We conclude, therefore, that the indictment herein did not state the offence, intended to be charged, with sufficient certainty, and that, for this cause, appellant's motion to quash it ought to have been sustained. *State v. Cook*, 52 Ind. 574.

This conclusion renders it unnecessary for us now to consider or decide questions arising under the alleged error of the court below, in overruling appellant's motion for a new trial.

The judgment is reversed, and the cause is remanded with instructions to sustain the motion to quash the indictment.

Filed Jan. 29, 1887.

No. 12,435.

109	411
141	32

SHERWOOD, ADMINISTRATOR, v. THE CITY OF LAFAYETTE
ET AL.

MORTGAGE.—Eminent Domain.—*Taking Mortgaged Property for Street.*—*Mortgagee Entitled to Damages Awarded.*—The mortgagee of land which is taken by a city for a public street is an owner within the meaning of the statute governing condemnation proceedings, and may recover from the city the damages awarded, notwithstanding the amount has already been paid to the mortgagor.

From the Tippecanoe Superior Court.

Sherwood, Administrator, v. The City of Lafayette *et al.*

J. B. Sherwood and S. P. Baird, for appellant.

W. C. L. Taylor, for appellees.

ELLIOTT, C. J.—The appellant's complaint alleges that Anna M. Arzt was, on the 12th day of December, 1870, the owner of land in the city of Lafayette; that she and her husband executed a mortgage on the land to Solomon Roring, now deceased, and that the mortgage was recorded on the day of its execution; that on the 20th day of August, 1879, the executor of the deceased mortgagee commenced suit to foreclose the mortgage, and obtained a decree of foreclosure; that, on the 30th day of December, 1872, the city of Lafayette commenced proceedings to condemn part of the mortgaged land for a street, and damages were awarded to Anna M. Arzt; that the damages awarded have never been paid, although possession of the land has been taken by the city, and that the mortgagors are insolvent.

The complaint states a cause of action. The seizure of the mortgaged premises did not destroy the validity of the mortgage or impair the rights of the mortgagee. He had a right to treat the lien of his mortgage as having been transferred to the fund created by the award. Mr. Jones correctly states the rule thus: "When the mortgaged property has been turned into money, or a claim for money in any way, as, for instance, by the taking of the property for public uses, or for the use of a corporation under authority of law, the rights of the mortgagee remain unaltered, and he is entitled to have the money in place of the land applied to the payment of his claim. Thus if a street be laid out through land subject to a mortgage, although the damages be assessed to the mortgagor, the mortgagee is entitled to them, as an equivalent for the land taken for the street." 1 Jones Mortg., section 708.

In the case of *Bank of Auburn v. Roberts*, 44 N. Y. 192, the court said: "The sum awarded arises from, or grows out of the land, by reason of the injury which has diminished its

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value. In equity it is the land itself." Substantially the same doctrine is asserted in *Ball v. Green*, 90 Ind. 75, see p. 76.

We agree with appellees' counsel, that a complaint must be framed on a definite theory, and be sufficient on that theory. *Judy v. Gilbert*, 77 Ind. 96 (40 Am. R. 289). We think the complaint before us conforms to these requirements. The theory of the complaint is, that the city of Lafayette has funds in its hands which, in equity, should be paid to the plaintiff, and it is good on the theory on which it proceeds. Anna M. Artz is made a party to assert her interest in the damages awarded, so that the whole controversy may be adjudicated, and it was not necessary to state what specific interest she claimed in the fund.

The third paragraph of the answer avers that proceedings were duly prosecuted for the condemnation of the land, that an award of damages was made to Anna M. Artz, and that the award was fully paid to her before any demand was made by the appellant.

This answer is bad. The authorities, without material conflict, hold that a mortgagee can not be deprived of his lien by a condemnation of the land embraced in his mortgage. It is true, as contended by appellees' counsel, that a mortgage does not convey title to the mortgagee. *Fletcher v. Holmes*, 32 Ind. 497; *Favorite v. Deardorff*, 84 Ind. 555. But, while the mortgage does not convey title to the land, it nevertheless does convey to the mortgagee an interest in the land itself of which he can not be divested. *Lease v. Owen Lodge, etc.*, 83 Ind. 498; *Helphenstine v. Meredith*, 84 Ind. 1.

There is a clearly defined distinction between a mortgage and a judgment lien; the one is a specific lien created by contract and protected as a contractual obligation, while the other is a statutory lien, general in its character, and subject to legislative control. *Gimbel v. Stoltz*, 59 Ind. 446; *Houston v. Houston*, 67 Ind. 276; *Evansville Gas-Light Co. v. State, ex rel.*, 73 Ind. 219 (38 Am. R. 129); *Duke v. Beeson*, 79

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Ind. 24, p. 31; *Duncan v. City of Terre Haute*, 85 Ind. 104; *Blair v. Hanna*, 87 Ind. 298, see p. 301.

A mortgage does create an interest in the land, and the authorities declare that proceedings under the right of eminent domain can not destroy the interest it creates.

In *Severin v. Cole*, 38 Iowa, 463, the question was examined with care, and it was said that: "The mortgagor, it is true, holds the legal title; but the mortgagee has an equitable interest in, or right to, the mortgaged property, and under the above statute is an 'owner of the real property.'"

It was said by the court in *Parks v. City of Boston*, 15 Pick. 198, 203: "It has heretofore been decided by this court, and apparently upon much consideration, in the case of *Ellis v. Welch*, 6 Mass. R. 246, that the term 'owner' in this statute, includes every person having an interest in real estate capable of being damnified by the laying out of a street."

In *Gimbel v. Stolte*, *supra*, the doctrine of these cases was approved by this court, for it was there said: "So, where mortgaged property has been condemned for street purposes by a city, the mortgagee is entitled to be paid out of the money allowed the mortgagor as damages." The authorities give full and strong support to the doctrine. *Baltimore, etc., R. R. Co. v. Thompson*, 10 Md. 76; *Tide Water Canal Co. v. Archer*, 9 Gill & John. 479; *White v. Rittenmyer*, 30 Iowa, 268; *Choteau v. Thompson*, 2 Ohio St. 114; *Kennedy v. Milwaukee, etc., R. W. Co.*, 22 Wis. 581; *Philadelphia, etc., R. R. Co. v. Williams*, 54 Pa. St. 103; *Astor v. Hoyt*, 5 Wend. 603; *In the Matter of John and Cherry Streets*, 19 Wend. 659.

As said in *Severin v. Cole*, *supra*: "This rule too is equitable and just. The mortgage being of record, it was entirely practicable for the defendant, in obtaining its right of way, to give notice to the mortgagee of record, and thereby protect its own interests and those of such mortgagee or his assigns."

It is only by adopting the view of these authorities, and treating the mortgagee as an owner within the meaning of

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the statute, that the statute itself can be upheld, for it is very clear upon principle and authority, that the mortgagee does own some interest in the land which can not be divested except by due proceedings under "the law of the land." *Soulard v. United States*, 4 Peters, 511; *Lease v. Owen Lodge*, etc., *supra*; *Helphenstine v. Meredith*, *supra*. Nor is any violence done to the language of the statute in treating a mortgagee as an owner, for, in a limited sense, he is an owner, as he has a proprietary interest in the land itself.

Judgment reversed.

Filed Jan. 29, 1887.

No. 13,405.

CARD v. THE STATE.

CRIMINAL LAW.—*Conspiracy.*—*Evidence.*—*Declarations of Co-Conspirator.*—

Where a conspiracy has first been established by sufficient proof, every declaration or act of any one of the conspirators, during the pendency of the criminal enterprise, in pursuance of the original plan and with reference to the common object, is competent evidence against each of them.

SAME.—*Forgery.*—*Conspiracy.*—*System.*—*Proof of Other Forgeries.*—Where, on the trial of one charged with the forgery of a promissory note, it is shown that the crime in question is one of a system of like crimes committed by the defendant in pursuance of a conspiracy, other notes forged by him during the pendency of the conspiracy and purporting to be executed by different persons, are admissible in evidence against him.

From the Kosciusko Circuit Court.

E. Haymond and *L. W. Royse*, for appellant.

L. T. Michener, Attorney General, and *W. B. Hord*, for the State.

Howk, J.—In this case the indictment charged that appellant and Theodore W. Strain, "on the 9th day of September, 1885, at the county of Kosciusko, in the State of Indiana,

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did then and there feloniously, falsely and fraudulently make, forge and counterfeit a certain promissory note, purporting to have been made and executed by one John F. Fisher, for the payment of money to one John Hall, which said false, forged and counterfeit promissory note is of the following tenor, to wit: " (Setting out a copy of such note), "with intent then and there and thereby, feloniously, falsely and fraudulently to prejudice, damage and defraud the said John F. Fisher."

Appellant was awarded a separate trial ; and upon his arraignment and plea of not guilty, as charged in the indictment, the issues joined were tried by a jury, and a verdict was returned finding him guilty, as charged, and assessing his punishment at imprisonment in the State's prison for ten years, and a fine in the sum of ten dollars. Over his motion for a new trial, the court rendered judgment against him upon and in accordance with the verdict.

The only error of which appellant's counsel complain in their brief of this cause, is the alleged error of the court below in overruling the motion for a new trial. In discussing this error counsel say: " We think that the court erred, during the trial, in permitting witnesses for the State to detail conversations had with Woodson S. Marshall and others, not in the presence of appellant, and desire to call the attention of the court to the fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh written reasons for a new trial. The argument of one will, we think, be applicable to all." We will consider so many of these causes for a new trial as appellant's counsel have discussed, in the order they have pursued in argument. They first direct our attention to the *fifth* reason assigned for a new trial, as follows: " The court erred in permitting the State, over the objections of defendant, to put in evidence a letter from Woodson S. Marshall to W. W. Mikels, dated January 21st, 1886." The letter referred to, in this cause for a new trial, reads as follows:

"*Mr. Mikels*—I dropped you a postal to-day. If Mr. S. wants the notes, I think he can have them, as Mr. H. is still

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here. If you come up in the morning, say nothing to any one until you see me. If you see Cook, and he asks you where you got the Hall notes, say from Hall, and that he is a Chicago man. But don't say you have any notes—that you returned them to Chicago. Will talk over matters if you come up. We may want to do some fine figuring. Burn this. If S. made a deed, bring it along.

(Signed) “Yours truly,

“8 P. M., 1, 21, '86.

W. S. MARSHALL.”

It is shown by the record, that appellant objected to the admission of this letter in evidence, “for the reason that the evidence is irrelevant and immaterial, and does not tend to prove any of the allegations in the indictment, and that it is a written declaration made by Woodson S. Marshall, in the absence of defendant and without his knowledge or consent, and was hearsay.” The court overruled these objections and admitted the letter in evidence, and appellant excepted.

The letter of Marshall was manifestly admitted in evidence by the trial court, upon the ground that it had been shown to the satisfaction of the court, by other evidence appearing in the record, that a criminal conspiracy had been entered into, by and between appellant and his co-defendant, Strain, and Marshall, the object and purpose of which conspiracy were the forgery of promissory notes, in the names of certain responsible persons, and the sale and utterance of such forged and counterfeit notes. There was evidence introduced which tended to prove the formation and existence of such a conspiracy by and between the parties named, for the purposes mentioned, and the parts which each of the conspirators was to perform in the accomplishment or furtherance of the criminal design; and that in pursuance of such conspiracy, and while attempting to perform the part assigned him therein, by selling and uttering certain of the counterfeit promissory notes forged by such conspirators, Marshall made certain verbal and written declarations, and,

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amongst others, the one referred to in the fifth cause for a new trial and heretofore quoted, of and concerning such notes and his efforts to sell and utter the same, and about John Hall, the payee named therein. It is manifest that the trial court regarded such evidence as sufficient to establish *prima facie* the fact of such a conspiracy, by and between appellant, Strain and Marshall, for the object and purpose aforesaid. We can not say that the trial court erred in its view of the effect of such evidence; for this question is one peculiarly for the consideration and decision of the learned court presiding at the trial.

Upon this subject, Mr. Greenleaf has said: "A foundation must first be laid by proof sufficient in the opinion of the judge to establish *prima facie* the fact of conspiracy between the parties, or proper to be laid before the jury as tending to establish such fact. The connection of the individuals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all; and is therefore original evidence against each of them. It makes no difference at what time any one entered into the conspiracy. Every one who does enter into a common purpose or design is generally deemed, in law, a party to every act which had before been done by others and a party to every act which may afterwards be done by any of the others in furtherance of such common design." 1 Greenl. Ev., section 111. The doctrine here declared has been approved and acted upon in many of our decided cases. *Williams v. State*, 47 Ind. 568; *Jones v. State*, 64 Ind. 473; *Walton v. State*, 88 Ind. 9; *Archer v. State*, 106 Ind. 426.

But appellant's counsel say: "Admitting for the sake of the argument, that the conspiracy was established, still the court erred in admitting the declarations and letter. We understand the rule to be, as laid down in 1 Greenl. Ev.,

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section 111: 'The acts and declarations, thus admitted, are those only which were made and done during the pendency of the criminal enterprise, and in furtherance of its objects.' "

Doubtless, counsel state the rule correctly, but they err, we think, in claiming that the criminal enterprise was not pending when the letter above quoted was written, or that it was not written in furtherance of the objects of the conspiracy. True, the evidence shows that the counterfeit note, upon which the indictment herein was predicated, had been forged, sold and uttered by the conspirators some time prior to the date of the letter, heretofore quoted; but it does not show that the conspiracy, which, as is apparent from the record of this cause, covered the forgery and utterance of many other counterfeit notes, had then come to an end. Indeed, it may be fairly inferred from all the evidence, we think, that the criminal enterprise, in which the conspirators were engaged, was at the flood-tide of apparent success when the letter to Mikels was written. We conclude, therefore, that the fifth cause for a new trial was not well assigned, as the Marshall letter referred to therein was competent evidence.

What we have said, in considering the fifth cause for a new trial, applies with equal force to the fourth, sixth, seventh, ninth, tenth and eleventh reasons, assigned for such new trial. Each of such reasons was based upon a different ruling of the court below, admitting in evidence, over appellant's objections and exceptions, certain declarations, verbal or written, of Marshall, of and concerning other notes which were shown to have been forged by such conspirators, and his efforts to sell and utter the same, and about John Hall, the payee named therein. The same objections were urged below, and are urged here, to the competency of these declarations, verbal or written, as evidence against appellant herein, as were urged to the admissibility of the letter heretofore quoted, addressed to "Mr. Mikels," as evidence against appellant. The formation and existence of the conspiracy, for the unlawful purposes mentioned, having been established by suffi-

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cient proof, every act or declaration of any one of the conspirators, in pursuance of the original plan and with reference to the common object, became and was original and competent evidence against each and all of them. Of course, it is true, as appellant's counsel claim, that nothing said or done by one of the conspirators in the absence of the others, *after* the common design has been fully consummated, can be used as evidence against the others or affect them in any way. But this is of no avail to appellant in this case. For here the existence of the conspiracy for an unlawful purpose has been established by sufficient proof, and it was not shown and does not appear that the common design had been fully consummated at the time the verbal and written declarations, which the State put in evidence, were made by one of the conspirators. On the contrary, we think it fairly appears from the evidence in the record, that the common design had not been consummated when such declarations were made. In regard to the admission of the acts or declarations of one conspirator as original evidence against each member of the conspiracy, substantially the same rule applies in criminal as in civil causes. *Smith v. Freeman*, 71 Ind. 85; *Hogue v. McClintock*, 76 Ind. 205; *Wolfe v. Pugh*, 101 Ind. 293; *Daniels v. McGinnis*, 97 Ind. 549.

Appellant's counsel next complain of the admission in evidence of thirteen promissory notes, other than the one set out in the indictment, purporting to have been executed by different persons, but all payable apparently to the same John Hall. Counsel say: "The only object that could be accomplished by this evidence, was to prove that the defendant had been guilty of numerous other forgeries. Coupled with this evidence, is the testimony of several witnesses that the notes were in the handwriting of appellant; and it was also in testimony that they were forgeries. The admission of these notes in evidence was clearly erroneous." In support of their position counsel cite and rely upon *Barton v. State*, 18 Ohio, 221, and *Bonsall v. State*, 35 Ind. 460.

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An examination of these cases shows very clearly, we think, that, while each of them was correctly decided, neither of them has any application to such a case as the one under consideration. We are of opinion that the court did not err in the admission of such other notes in evidence, although they were shown to have been forged by appellant. Upon this subject, in his Criminal Evidence, section 32, Mr. Wharton says: "Suppose that it is alleged that the crime in question was one of a system of mutually dependent crimes; is it admissible, on a trial for one of these crimes to put in evidence such other crimes, for the purpose of showing this system? In several lines of civil cases, such evidence has been held admissible. Nor is there any reason why such evidence should not be received in criminal cases. In order to prove purpose on the defendant's part, system is relevant, and in order to prove system, isolated crimes are admissible from which system may be inferred. * * *. Conspiracy cases give signal illustration of the rule here stated. The acts of each conspirator emanate from him individually, yet when they are part of a system of conspiracy they are admissible in evidence against his co-conspirators, although each component act may constitute an independent offence. The reason for the rule in this and similar cases is that when once system is proved, each particular part of the system may be explained by the other parts which go to make up the whole." Upon the same subject see, also, *Harding v. State*, 54 Ind. 359; *Robinson v. State*, 66 Ind. 331; *Thomas v. State*, 103 Ind. 419, and authorities cited on pp. 432, 433.

Appellant's counsel mildly complain in argument of two of the court's instructions to the jury trying the cause. No good purpose would be subserved, we think, by our setting out and commenting on either of these instructions. It will suffice for us to say that we have carefully considered all the court's instructions to the jury, and that, taken as a whole, they presented to the jury the law of this case fully and fairly for the appellant.

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We have found no error which would authorize a reversal of the judgment.

The judgment is affirmed, with costs.

Filed Dec. 23, 1886; petition for a rehearing overruled Feb. 23, 1887.

No. 12,840.

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WESTERN RAILWAY COMPANY.

109	422
184	363
109	422
171	478

COMMON CARRIER.—*Evidence.*—*Bill of Lading.*—*Parol Agreement to Forward by Particular Line.*—Where a shipper accepts a bill of lading which designates no route by which the consignment is to be forwarded after reaching the terminus of the contracting company's line, it is not competent to prove a prior parol agreement to forward by a particular line.

SAME.—*When First Carrier May Select Forwarding Line.*—*Contract.*—*Provisions Supplied by Law.*—*Contradiction by Parol.*—The shipper, in such case, authorizes the first carrier to select any usual or reasonably direct and safe route by which to forward the consignment beyond its line, and this provision, being imported into the contract by law, is as unassailable by parol as the express terms of the contract.

SAME.—*Breach of Common Law Duty.*—*Evidence.*—Where it appears that goods were received for shipment under a written contract set up in one paragraph of complaint, there can be no recovery under another paragraph counting on a breach of the carrier's common law duty, and evidence of a parol agreement is not admissible under the latter paragraph.

From the Clinton Circuit Court.

G. W. Paul, J. E. Humphries, T. F. Davidson, F. M. Dice, S. O. Bayless and W. M. Reeves, for appellants.

C. W. Fairbanks, W. R. Moore and O. Gresham, for appellee.

MITCHELL, J.—The plaintiffs below brought this suit against the railway company to recover damages for an alleged breach of a contract for the shipment of a car load of horses

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from Crawfordsville, Indiana, to Buffalo, New York, *en route* to Boston, Massachusetts.

At the time the horses were delivered for shipment by the appellant's agent, the latter received from the railway company a bill of lading which contained, among other stipulations, the following :

" LIVE STOCK CONTRACT—THE INDIANA, BLOOMINGTON AND WESTERN RAILWAY.

CARS.		Consignee's marks.	CRAWFORDSVILLE, Aug. 14, 1883. Received from W. H. Schooler the following stock : Seventeen horses.
Initial.	No.	Destination, Etc.	
I., D. & S.	1275		
		C. & E. SNOW, Boston, Mass.	
Bill of lading (Contracting) From Crawfordsville to Buffalo, N. Y. via. Through at \$73.00 per car load.			Consigned, numbered and marked as per margin, to be transported by the Indiana, Bloomington and Western Railway, to its freight station at Indianapolis, ready to be delivered to the consignee, or his order, or (if the same is to be forwarded beyond said station) to the agent of a connecting railroad or forwarding company, <i>whose line may be considered a part of the</i>

route, to the place of destination designated in the margin, to be in like manner forwarded and delivered to, and by each succeeding railroad or forwarding company in the route, until it reaches the point contracted for in this bill of lading."

It was assigned as a breach of its contract, that the railway company received the horses, and carried them by its own line to Indianapolis, after which, instead of delivering them to the "Bee-Line Route," as it was alleged it had agreed to do, it delivered them to the "Nickel-Plate Road," which, by reason of the latter being the longer route by about three hundred miles, delayed the horses in arriving at Boston some four days beyond what would have been required by the

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other route. By reason of this delay, and the unfitness of the route chosen, it is alleged the horses sustained permanent injury. It is also alleged that the failure to ship by the "Bee-Line Route" was a violation of the contract of shipment.

The complaint is in two paragraphs. The bill of lading was made a part of the first paragraph. Both paragraphs count upon the violation of an alleged agreement to ship from Indianapolis to Buffalo, N. Y., by the "Bee-Line Route."

The defendant answered by a general denial. The case was submitted for trial to a jury. Under instructions from the court the jury returned a verdict for the defendant.

At the trial the plaintiffs produced W. H. Schooler, their agent at Crawfordsville, Indiana, and by suitable questions, addressed to him while testifying as a witness, proposed to prove that prior to the shipment of the horses, the plaintiffs, through the witness, made a contract with the agent of the railway company, by which it was agreed that the company should ship the horses by its route to Indianapolis, thence by the "Bee-Line Route" to Buffalo, N. Y. The plaintiffs proposed to prove further, that it was agreed that the horses were to be unloaded at Gallion, Ohio, a regular feeding point on the route last above mentioned, and that after being fed and watered, they were to be again reloaded, and carried by that route to Buffalo. They proposed to prove further that the defendant had carried other car loads of horses for the plaintiffs, under this same arrangement, which was by parol, and that they had been carried over the Bee-Line road.

The bill of lading having been exhibited to the court, and it having been made to appear that the shipment in question had been made by the company, after such bill of lading had been delivered to and received by the plaintiffs' agent, the court excluded all evidence relating to any parol agreement covering the subject of the shipment. Whether such evidence was admissible is the only question presented for consideration.

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The appellants contend, there being no route stipulated in the bill of lading, that it became the duty of the appellee to forward the horses by the usual and most direct route from Indianapolis to Buffalo, and that hence the evidence offered should have been received.

This proposition is in part abundantly maintained, but this does not meet the point in dispute. Having taken a bill of lading which upon its face designates no particular route by which the horses were to be forwarded, after reaching the terminus of the appellee's line, was it competent nevertheless to prove a parol agreement to forward by a particular line?

Conceding that a carrier is liable for any injury resulting to a shipper by reason of its selection of an unusual or indirect route, by which to forward freight which is destined to a point beyond its line, the question still remains, how was it material or competent to add to or vary the written contract of shipment by proof of a previous parol agreement?

A shipper, who receives a bill of lading for goods consigned to a point beyond the terminus of the initial carrier's line, authorizes the initial carrier to select any usual or reasonably direct and safe route by which to forward, after the goods reach the end of his line, unless the particular line by which the goods consigned are to be forwarded is designated in the bill of lading. In such a case, the bill of lading being silent in respect to the line by which the goods are to be forwarded, its effect is the same as if a provision were therein inserted that the carrier should have the right to select at his discretion any customary or usual route which was regarded as safe and responsible. This provision, being thus imported into the contract by law, is as unassailable by parol as any of the other express terms of the contract. *White v. Ashton*, 51 N. Y. 280; *Hinckley v. New York, etc., R. R. Co.*, 56 N. Y. 429; *Simkins v. Norwich, etc., Steamboat Co.*, 11 Cush. 102; *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 276, 288.

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Stipulations which the law imports into a contract, become as effectually a part of its terms as though they were expressly written therein. *Long v. Straus*, 107 Ind. 94.

In the absence of fraud or mistake, it must be conclusively presumed that the oral negotiations respecting the terms and conditions upon which the goods were received, and the route by which they were to be forwarded, are merged in the bill of lading. This must be taken as the final repository and the sole evidence of the agreement between the parties. *Indianapolis, etc., R. R. Co. v. Remmy*, 13 Ind. 518; *Hall v. Pennsylvania Co.*, 90 Ind. 459; *Bartlett v. Pittsburgh, etc., R. W. Co.*, 94 Ind. 281.

The cases last cited maintain the rule, that where suit is brought against a common carrier for a breach of common law duty, in failing to carry or deliver goods, if the evidence shows that the goods were received under a special written contract which was not declared on, the variance is fatal, and there can be no recovery. This suggestion disposes of all that is said by counsel, in respect to the competency of the offered evidence, as applicable to the second paragraph of the complaint. Since it appeared that the goods were received for shipment under the written contract set up in the first paragraph, there could, in no event, have been a recovery under the second paragraph, which simply counted upon a breach of the carrier's common law duty.

The facts offered in evidence do not bring the case under consideration within the principle which ruled the case of *Guillaume v. General Transportation Co.*, 100 N. Y. 491. In that case the goods had been received, and actually shipped, in pursuance of a parol contract. It was held that the subsequent receipt of a bill of lading did not preclude the shipper from showing the terms of the parol contract under which the goods were received and shipped. In that case the court said: "As a general rule, where goods are delivered to a carrier for transportation, and before the goods are shipped, a bill of lading or receipt is delivered by him to the

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shipper, the latter is bound to examine it and ascertain its contents, and if he accepts it without objection, he is bound by its terms; he can not set up ignorance of its contents, and resort can not be had to prior parol negotiations to vary them." *Germania F. Ins. Co. v. Memphis, etc., R. R. Co.*, 72 N. Y. 90 (28 Am. R. 113).

The plaintiffs' case, as made by their complaint, proceeds upon the theory that the appellee violated its contract by shipping the property delivered to it, over an unusual and indirect route which was not provided with proper facilities for the care of stock, when another customary, direct and more available route was open for carriage. It was competent to have recovered upon this theory if the facts had sustained it, without proof of a parol agreement such as was offered. Such proof was neither material nor competent after it had been made to appear that prior to the shipment a written bill of lading had been received by them which covered the terms of shipment. There was no error.

The judgment is affirmed, with costs.

Filed Jan. 4, 1887; petition for a rehearing overruled Feb. 5, 1887.

No. 12,645.

GOUDIE ET AL. v. JOHNSTON ET AL.

WILL.—*Personal Property.*—*Life-Estate.*—*Power of Disposition.*—A bequest of personal property to a wife for use during her life, with power to control and manage the same, and at her death all remaining to go to grandchildren, vests in her a life interest, but with no absolute power of alienation.

SAME.—*Remainderman.*—*Protection of Interest.*—*Waste.*—One having an estate in remainder in personal property may maintain a suit against the life-owner for the protection of his interest.

From the Franklin Circuit Court.

109	427
129	91
109	427
135	653
109	427
143	380
109	427
147	399
147	394
109	427
152	119
109	427
155	335

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L. W. Florea, G. C. Florea, S. E. Urmston and I. Carter,
for appellants.

H. Berry, F. Berry, J. F. McKee, D. W. McKee, J. E. McDonald, J. M. Butler and A. L. Mason, for appellees.

ELLIOTT, C. J.—In the will executed by Alexander W. Johnston, deceased, are the following provisions :

“ Item 2. I give, grant and bequeath to my wife, Jane Johnston, for her use during her natural lifetime, all the rest and residue of my estate, real and personal, not mentioned in item No. 1 of this will, she to have the control and management of the same, and at her death all of said personal estate remaining, and all of said real estate, except that named in item No. 1, shall go to and be equally divided among my grandchildren, to wit : Rose B. Goudie, Hannah A. Irwin, Clement A. Cory, Maud Cory and Lenora Cory, share and share alike ; and if any of said grandchildren shall die without issue alive, before division or distribution of said property among them, then, and in that case, all of said property shall be equally divided among the survivors, unless one of them should be dead leaving issue, then such issue shall take the share that would go to such deceased grandchild if living.

“ Item 3. I further will and direct that Clement R. Cory, husband of Mary P. Cory, shall never have any part of my estate, or shall never have the management or control of the same.”

There are other provisions in the will, but, as these are all that relate to personal property, and as the controversy concerns only that property, it is unnecessary to notice the other provisions of the instrument. The provisions making a disposition of the personal estate of the testator are complete in themselves, and are neither aided nor impaired by any other provisions of the will, so that the decision of the controversy turns upon the construction to be given to the provisions of the will we have copied.

In our judgment the controlling words of this will are,

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“for her use during her natural lifetime,” for there are no other words of equal power in the instrument. These words not only confine the first taker's estate to her life, but they further confine it by declaring that the property is for her use. If the property is for her use during her natural lifetime, it is difficult, if not impossible, to conceive how she can have an absolute power of disposition. We freely grant that this power of disposition may often be implied. *Silvers v. Canary*, ante, p. 267, and cases cited; *Ramsdell v. Ramsdell*, 21 Maine, 288; *Scott v. Perkins*, 28 Maine, 22; *Shaw v. Hussey*, 41 Maine, 495; *Paine v. Barnes*, 100 Mass. 470; *Harris v. Knapp*, 21 Pick. 412; *Scholl's Appeal*, 2 Atl. R. 538.

But we do not think that the language of the will before us contains words from which a power of disposition can be implied; on the contrary, we think the language excludes the implication that any such power exists. The words, “she to have the control and management of the same,” are not at all incompatible with her right to use the property during her life. The only words which can be regarded as at all inconsistent with those confining her interest to an estate for life, are the words, “and at her death all of said personal estate remaining, and all of my real estate, except that named in item No. 1, shall go to my grandchildren;” but we can not regard these words as of such potent effect as those first quoted. Nor would they be consistent with the language of the third item of the will, if construed as the appellees assume they should be, as is obvious from an examination of that clause.

It must be kept in mind that the property is not unconditionally devised to Mrs. Johnston even for life, for the bequest is “for her use during her natural lifetime.” There is, therefore, a clear restriction, not only to her life, but to her use. It can not justly be affirmed that one to whom property is bequeathed “for her use” during life is clothed with a power of disposition, for the word *use* is one of much force,

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and confines the estate to the hands of the first taker, since it is logically inconceivable that one having a right to use can possess the absolute power of alienation. We can not thrust aside the words "for her use during her natural lifetime," for they are of high importance and great strength.

It is the law that an estate given in clear words can not be cut down by subsequent words unless they are equally clear and decisive, and it is not easy to see why, upon a like principle, an estate created by clear words can be enlarged by words less clear and decisive. *Hochstedler v. Hochstedler*, 108 Ind. 506; *Bailey v. Sanger*, 108 Ind. 264; *Allen v. Craft*, *post*, p. 476.

However this may be, here are words of clear and certain import, and no others that enlarge their meaning, and we must assign to them controlling force. But we have other provisions materially strengthening these words, for a remainder is limited to the testator's grandchildren, and it is, therefore, manifest that he contemplated that the estate should not all be disposed of by the first taker, for, if that had been in contemplation, there would have been neither necessity nor propriety in providing for a disposition of property remaining after the death of the first taker. The rule recognized by the authorities is, that where there is a remainder limited to children or grandchildren, the implication is that the first taker is invested with nothing more than a life interest in the property. *Hawkins Wills* (2d ed.), 178. This, it is easy to see, is the natural and reasonable rule, for, if the first taker took the whole estate, there could be no estate or interest in remainder.

Personal property is, as every one knows, of a perishable nature, and use may totally destroy or materially impair it, so that it is quite natural and reasonable to interpret the phrase, "all of said personal estate remaining," to mean such as use has not destroyed. This is a just and reasonable implication, especially so where, as here, it is consistent with the other provisions of the will. We are not, however, with-

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out authority upon this precise question. The Supreme Court of the United States, speaking of a will very like the one before us, said: "The use of many species of personal property necessarily consumes it. The words under consideration may, therefore, fairly be construed to refer to the personalty, and the entire clause to give to his children a remainder in the real estate, and whatever of the personalty was not consumed by the widow during her widowhood." *Giles v. Little*, 104 U. S. 291. In *Green v. Hewitt*, 97 Ill. 113 (37 Am. R. 102), it was said: "It was also reasonable to suppose that if she lived long as his widow, some of the articles of personalty would be worn out, lost or destroyed; hence, in making the limitation over, it was but natural and proper to use the expression 'whatever remains.' It had reference to the anticipated condition of the personal estate when it would, under the limitation, pass into his daughter's hands. And this is all the significance the expression has."

It is quite clear that the words "all of said personal property remaining" are of feeble effect as compared with the words "for her use during her natural lifetime."

Our ultimate conclusion upon this branch of the case is, that Jane Johnston takes a life interest in all the personal property of which her husband died seized, but that she is not invested with an absolute power of alienation. This conclusion, as we think we have shown, rests on principle, and it certainly is well sustained by authority.

The case of *John v. Bradbury*, 97 Ind. 263, carries the general doctrine much further than we are required to do here—possibly too far—and the case of *Van Gorder v. Smith*, 99 Ind. 404, while recognizing the general doctrine, points out the true distinction between seemingly similar cases. There are other cases in our reports which assert a doctrine strictly analogous to that affirmed in our conclusion, among them *Hopkins v. Quinn*, 93 Ind. 223, *White v. Allen*, 81 Ind. 224, *Eltzroth v. Binford*, 71 Ind. 455.

The decisions of other courts affirm the law to be as we-

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have asserted it. *Smith v. Bell*, 6 Peters, 68; *Giles v. Little*, *supra*; *Brant v. Virginia Coal, etc., Co.*, 93 U. S. 326; *Green v. Hewitt*, *supra*; *Henderson v. Blackburn*, 104 Ill. 227 (44 Am. R. 780); *Whitcomb v. Taylor*, 122 Mass. 243; *Paine v. Barnes*, 100 Mass. 470; *Baxter v. Bowyer*, 19 Ohio St. 490; *Stuart v. Walker*, 72 Maine, 145 (39 Am. R. 311); *Terry v. Wiggins*, 47 N. Y. 512; *Gregory v. Cowgill*, 19 Mo. 415; *Hull v. Culver*, 34 Conn. 403.

Some of these cases go further than it is necessary for us to do here, but, in so far as they bear upon the phase of the question directly presented to us, we accept them as authority without inquiring whether it is, or is not, proper to extend the doctrine to the limits to which some of the courts have carried it.

The theory of the appellants' complaint, and the concessions of their argument in this court, are, that Jane Johnston has a right to use the property for her support, and for that purpose to dispose of it, but that she has not the absolute power of alienation. Thus regarded, the case is far within the rule, and the construction given the will by the trial court was not the proper one.

If Mrs. Johnston has only an executory life interest in the personal property involved in this controversy, then, upon sound principles of equity and justice, those who have an interest in remainder have a right to invoke the aid of the courts to protect that interest. It is, perhaps, not easy to determine just what relief they are entitled to, but it is clear that they are not entirely without a remedy. Mrs. Johnston can not be inhibited from managing and controlling the property, for that right is expressly given her by the will; but she may be prohibited from destroying it, and from disposing of it, unless it is necessary that it be disposed of for her use and support, or for the purpose of making a change in the investments. The complaint, as we understand it, concedes to her the right to the management and control of the property, as well as the right to make sales for the purpose of

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changing an investment, or for the purpose of securing money for her support; but it denies her right to exercise absolute ownership over the property. Our judgment is, that the complaint does not claim too much; whether it claims as much as the law would award the plaintiffs, it is not necessary for us to consider or decide.

It is a very old equity doctrine, that courts will award relief to one holding an interest in remainder against the wrongs of an owner of a life interest. Anciently, the rule seems to have been that the owner of the life-estate would not be required to give security, but would be required to file an inventory of the property. *Foley v. Burnell*, 1 Bro. Ch. Cases, 274; *Slanning v. Style*, 3 Peere Williams, 334.

Chancellor Kent says: "Lord Thurlow said that the party entitled in remainder could call for the exhibition of an inventory of the property, and which must be signed by the legatee for life, and deposited in court, and that is all he is ordinarily entitled to. But it is admitted that security may still be required in a case of real danger, that the property may be wasted, secreted, or removed." 2 Kent Com. (12th ed.) 354, and authorities cited in note.

It has also been held by able courts, that the owner of the life interest may be compelled to make a permanent and secure investment for the protection of those whose interest is in remainder. *Covenhoven v. Shuler*, 2 Paige Ch. 122; *De Peyster v. Clendining*, 8 Paige Ch. 295.

The question as to the character and scope of the remedy is not very fully discussed, and we decline to decide what it should be; nor is it essential that the question should be now determined, as it is enough for us to declare, as we do, that the complaint contains facts showing that the plaintiffs are entitled to some relief, for, as is well settled, a complaint containing facts entitling a plaintiff to some relief will repel a demurrer. *Bayless v. Glenn*, 72 Ind. 5. The measure of relief to which a plaintiff is entitled can not, ordinarily, be

Hall et al. v. Durham.

determined on a demurrer to the complaint, since, if the complaint makes a case for some relief, although not all that is asked, a demurrer should be overruled.

Judgment reversed, with instructions to overrule the demurrer to the complaint.

Filed Feb. 4, 1887.

No. 12,782.

HALL ET AL. v. DURHAM.

JUDGMENT.—*Collateral Attack*.—A judgment, regular on its face and one which the court had jurisdiction to render, can not be attacked collaterally.

INSTRUCTIONS TO JURY.—*Verdict*.—*When Court May Direct*.—It is not error for the court to instruct the jury what their verdict shall be, where the controlling facts are admitted, or are not controverted in any essential respect.

EVIDENCE.—*Ejectment*.—*Materiality*.—Evidence offered in an action of ejectment, by which it is proposed to show that all the matters in difference between the parties concerning the real estate in dispute had been compromised and adjusted, should be excluded where nothing has been shown as to the materiality of the proffered evidence, or the manner in which the alleged compromise was made.

From the Montgomery Circuit Court.

T. E. Ballard and M. E. Clodfelter, for appellants.

J. R. Courtney, for appellee.

NIBLACK, J.—Some time previous to the September term, 1884, of the Montgomery Circuit Court, William H. Durham, the appellee in this case, commenced an action in that court against John R. Hall and Margery Hall, the appellants in this appeal, to quiet his title to a tract of land in Montgomery county.

At the term of court above named, the defendants in that action failed to appear, and, it being shown that summons

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had been served upon them more than ten days before the first day of the term, a judgment quieting the plaintiff's title to the land described in his complaint was entered against the defendants as upon default.

In March, 1885, this action, which was for the recovery of the possession of the tract of land to which the title had been quieted as above stated, was commenced by Durham against the same defendants, and a trial resulted in a verdict and judgment in favor of Durham.

At the trial Durham offered in evidence the complaint and judgment in the action prosecuted by him as above to quiet his title, but the defendants objected:

First. Upon the ground that the complaint was not sufficient to support such a judgment.

Second. That the judgment had been changed in a material respect after it was first entered, without their knowledge or consent.

The court heard evidence in regard to the alleged change in the judgment, and, evidently coming to the conclusion that, if any change was made in the judgment after it was first entered by the clerk, it was before it was signed by the judge, admitted both the complaint and judgment in evidence.

The reasonable inference from the evidence which the court heard was, that the judgment so read in evidence was entered upon the proper order-book of the Montgomery Circuit Court; that it appeared to have been entered in the usual course of proceeding, and was signed by the proper judge. Under such circumstances the objection to the reading of the judgment in evidence was a merely collateral attack on the validity of the judgment, as between the parties, which was regular on its face and of a class which the court had jurisdiction to render. Such an attack was not permissible, and hence the court did not err in admitting the judgment in evidence.

As to the sufficiency of a complaint to quiet title, see the case of *Kitts v. Willson*, 106 Ind. 147.

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John R. Hall, one of the defendants, was called as a witness, and it was proposed to prove by him that all the matters in difference between the parties concerning the real estate in controversy had been compromised and adjusted, but there was no statement as to the manner in which the alleged compromise and adjustment had been made, and the evidence thus proposed was excluded. There was no error in this ruling. Nothing was shown from which the materiality of the proffered evidence could be inferred.

It is claimed that the court, after the evidence was concluded, instructed the jury to return a verdict for the plaintiff, which they accordingly did, and that this was erroneous because of some alleged conflict in the evidence on some questions raised at the trial.

The clerk, after noting on the order-book the empanelling of the jury, proceeded as follows: "And the jury, having heard the evidence and argument of counsel, are, by the order and direction of the court, required to return the following verdict:" then setting out the verdict in full, which, as has been stated, was in favor of the plaintiff. But there is no mention of these proceedings in the bill of exceptions. If the jury were required to return a particular verdict, it was necessarily through the medium of an instruction given them by the court, and a question could only be reserved upon such an instruction by bringing it into the record in some lawful manner. The entry of the clerk, set out as above, did not take the place of a bill of exceptions, and consequently presents no question for our consideration. R. S. 1881, section 650; *Kesler v. Myers*, 41 Ind. 543; *Berlin v. Oglesbee*, 65 Ind. 308; *Olds v. Deckman*, 98 Ind. 162; *Redinbo v. Fretz*, 99 Ind. 458.

The record presents no available error, and in consequence the judgment is affirmed, with costs.

Filed Jan. 27, 1887.

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ON PETITION FOR A REHEARING.

NIBLACK, J.—A brief accompanying a petition for a rehearing, filed in this cause, calls our attention specifically to an instruction contained in the bill of exceptions, which, in effect, directed the jury to find a verdict for the plaintiff. Our attention was not so called at the former hearing, and hence we fell into the error of assuming that the bill of exceptions did not show that such an instruction had been given. Our mistake in that respect only requires us now to consider whether the circuit court erred in giving such an instruction upon the facts as presented by the evidence. The recognized rule on the subject is, that where the controlling facts are admitted, or are not controverted in any essential respect, it is not error for the court to instruct the jury what their verdict should be. *Adams v. Kennedy*, 90 Ind. 318; *Carver v. Carver*, 97 Ind. 497; *Wabash R. W. Co. v. Williamson*, 104 Ind. 154.

For the reasons given in the principal opinion, the circuit court did not err either in the admission or rejection of evidence, and, upon the evidence admitted, the circuit court was, as we believe, justified in instructing the jury that the verdict should be for the plaintiff. So long as the judgment quieting the title of the plaintiff in the land in controversy shall remain unreversed or unmodified, we are unable to see how in this action a verdict for the defendants below could be sustained.

Counsel assert, in argument, that the appellee's claim to the land in suit originated in a tax sale for a comparatively small sum of money, and that the demand for possession of the entire tract is not only unconscionable but cruel under all the circumstances. If this be true, then we greatly regret our inability to afford some relief. But the justice of the appellee's original claim or title to the land is in no manner before us. That was a matter which ought to have been

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litigated, if at all, in the action to quiet title in which the appellants, for some unexplained reason, made default.

It is still insisted that the circuit court erred in not permitting the witness, Hall, to testify that the appellee's claim to the land had been compromised and adjusted, upon the ground that in actions like this all defences are admissible under the general denial. But there was, as has been stated, no statement showing that the facts proposed to be proved were such as would have constituted a defence to the action. Hence we have no reason to infer that the evidence excluded would have in any manner tended to establish a valid defence.

The petition for a rehearing is overruled.

Filed Feb. 25, 1887.

No. 12,595.

WEISS ET AL. v. GUERINEAU.

JUDGMENT.—*Collateral Attack.*—A party against whom an unauthorized or inequitable judgment has been obtained, whether by fraud or mistake, can not treat the judgment as invalid, until he has taken some proceedings known to the law to set it aside, or to secure its modification.

SUBROGATION.—*Payment of Debt of Another.*—One who, for the protection of his own property, is compelled to pay a debt, to which he is a stranger, and for the payment of which another is either legally or equitably bound, becomes entitled, on the principles of subrogation, to avail himself of all the remedies to which the person to whom the payment was made was entitled.

SAME.—*Liability of Party for Whose Use Money has been Paid.*—In such case, the party so paying money for the protection of his property, may maintain an equitable suit as for money paid to the use of the other.

SAME.—*Judgment.*—*Payment in Pursuance of.*—Where money has been paid in pursuance of a judgment, such judgment can not be interposed to prevent a recovery, in case the person receiving the money so paid fails to discharge an obligation against himself, which obligation, as a result

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127 353
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138 54

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130 233

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131 28
132 504

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134 154

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138 373

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154 879

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159 327

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109 438
161 124

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of the same judgment, it became his duty to pay out of the money so received.

From the Vigo Circuit Court.

I. H. C. Royse, R. B. Stimson, S. C. Stimson and R. Dunigan, for appellants.

H. C. Nevitt and J. W. Shelton, for appellee.

MITCHELL, J.—Prior to the year 1873, Robert N. Hudson, being the owner in fee simple of out-lot No. 34, in the city of Terre Haute, executed an indenture of mortgage, by which he conveyed the lot so owned and described to George P. Bissell as security for a loan of \$15,000.

The lot extended lengthwise from Fifth to Sixth streets, the west frontage abutting upon the first, and the east upon the last above mentioned street. On the north the lot was bounded by Oak street, and on the south by an alley. As it is described, the tract apparently comprised the whole of one-half square or block.

Subsequent to the mortgage to Bissell, Hudson conveyed, by deed of general warranty, seventy-four feet in depth across the west, or Fifth street frontage, to A. F. Smith, who subdivided the part so conveyed, designating and numbering the several parcels into which he divided it, as lots 1, 2, 3, 4, 5 and 6, respectively, in Smith's subdivision of out-lot No. 34. Except the seventy-four feet above mentioned, the title to out-lot 34 remained in Hudson, the part remaining unsold being designated as the "Hudson residence."

Soon after the subdivision, Smith conveyed lots 1, 3 and 4 to the appellants, Weiss and Greenawalt. Lot 2 was conveyed to George C. Duy and wife, while the title to lots 5 and 6 was retained by Smith.

Afterwards Duy and wife executed two separate mortgages for \$1,000 each on lot 2, and Smith executed one for a like amount on lot 6, the three mortgages thus executed having been given to secure debts due from the several mortgagors to Mary A. Guerineau.

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Pursuant to a decree of the United States District Court for the District of Indiana, by which decree all those interested in out-lot 34, as above detailed, were bound, the whole tract was sold at a marshal's sale on the 11th day of September, 1878, to satisfy the Bissell mortgage. George P. Bissell became the purchaser at this sale. Before the time for redemption expired, Weiss and Greenawalt, for the purpose of protecting their title to lots 1, 3 and 4, above mentioned, secured an arrangement with Bissell, by which they subsequently acquired title through the Bissell decree to the entire tract.

In consummating this arrangement with Bissell, it became necessary or convenient for the appellants, Weiss and Greenawalt, to make a new loan from Bissell of \$11,000. This loan was secured by the appellants giving Bissell their personal obligations for \$10,000 and \$1,000 respectively. The \$10,000 was secured by a new mortgage on the Hudson residence, while lot 6 was mortgaged to secure the \$1,000 note. The appellants paid Bissell the residue of the amount due on his purchase under the decree in cash.

Prior to, and in contemplation of, the arrangement above mentioned with Bissell, the appellants made a written contract with Hudson, the effect of which was that upon certain conditions and considerations therein mentioned, the time for redemption from the sale under the Bissell decree, or the right to repurchase the property, was to be extended six, and contingently twelve months, beyond the statutory period. The provisions of this agreement were to inure to the benefit of, and be available to any of those interested as grantees or mortgagees under Hudson.

The parties having subsequently disagreed as to their rights and obligations under the agreement last above mentioned, Hudson filed a bill against the appellants, asking the intervention of the court, to compel the execution of the contract, and to permit him to redeem according to its terms. A similar proceeding had been commenced for a like purpose by the appellee and his sister Adelaide, they having succeeded as the

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heirs of Mary A. Guérineau, deceased, to the mortgages above mentioned on lots 2 and 6.

The proceedings thus separately commenced were consolidated prior to the hearing. After the consolidation a decree was given, the effect of which was to establish the right of all or either of the several complainants in the consolidated proceeding to redeem or repurchase the property, upon the condition that within a time limited in the decree the sum found to be due the appellants should be tendered and paid.

An account was stated, and it was found and adjudged that there was due the appellants the sum of \$24,504.39. The court appointed a commissioner, and directed that, whenever it was made to appear, that either of the parties complainant in the proceeding had paid the sum found due, within the time limited, a conveyance of the entire tract should be made to the person so paying. It was also made a part of the decree that the person so redeeming might assume and ultimately pay off the appellants' \$10,000 note which was secured by the mortgage on the Hudson residence, such assumption and payment to be a part liquidation of the \$24,504.39 found to be due the appellants. Concerning the mortgage on lot 6 the decree was silent.

Within the time stipulated the appellee, Louis A. Guérineau, paid the amount required and received a deed from the commissioner, according to the terms of the decree.

When the account was taken at the hearing above referred to, the mortgage on lot 6 for \$1,000 was of record unsatisfied. The appellants' attorneys, supposing it to be the truth, stated to the court that the debt secured by that mortgage had been paid off by the appellants. Statements were made by the appellants, or others on their behalf during the progress of the hearing, similar in effect. These statements were accepted as true, both by the court and the appellee, and the amount of this mortgage, as also the \$10,000, was included in the \$24,504.39, which was found to be the sum required to be paid in order to redeem. Upon the supposi-

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tion that the \$1,000 had been paid by the appellants, no provision was made in the decree respecting its assumption by the persons entitled to redeem.

After the amount had been paid by the appellee, according to the terms of the decree, and after the deed had been made to him by the commissioner, it turned out that the debt secured by the mortgage on lot 6 had not been paid, and the holder thereof soon after instituted suit and obtained a decree of foreclosure thereon against the lot. The appellants refused to pay off the debt, and in order to protect his title to lot 6, the appellee was compelled to pay \$1,250.89.

The facts above stated are extracted from the first paragraph of the complaint, and the exhibits attached thereto. This action was brought by the appellee against the appellants to recover the amount paid as stated above to redeem lot 6.

The court overruled a demurrer to the complaint, and upon issues made thereon, a trial was had resulting in a verdict and judgment for the plaintiff below for the amount so paid.

The propriety of the ruling of the court, in overruling the demurrer to the complaint above summarized, is the chief subject of discussion.

On behalf of the appellant, it is contended that while the decree under which the redemption was made, and which fixed the amount to be paid to the appellants, is permitted to stand, the question litigated in this case is *res adjudicata*, and, therefore, not open to further inquiry. The argument is, that in the nature of the case, all matters affecting the equities between the parties, as respects the amount to be paid in order to redeem, were before the court and became the subject of inquiry in that proceeding.

The rule that a question once passed upon by a court of competent jurisdiction, is forever settled as to the parties to the record, while the judgment or decree which determines that question remains unreversed and in force, is invoked as

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an estoppel against the appellee. Within this rule, it is claimed, the former judgment presents an insuperable obstacle against the right of the plaintiff to recover upon the facts disclosed in his complaint.

Conceding the general rule, the appellee nevertheless insists that it does not control in this case. His contention is, that the doctrine of *res adjudicata* does not apply here, because the inquiry concerning the amount to be paid in order to effect a redemption, was merely incidental or collateral to the matter in issue in that proceeding. Hence it is said, this action may be maintained notwithstanding the former judgment, because the appellant, by representing that the mortgage on lot 6 was paid off, when in truth it was not, thereby perpetrated a legal fraud, both upon the court and the appellee. Neither view thus put forward affords a satisfactory solution of the case, as we regard it, upon the facts disclosed. The amount required to be paid in order that a redemption might be effected under the Hudson contract, was so directly involved, and was so material, that the decree in that respect must be regarded as conclusive upon all those who were parties to that proceeding. While that decree remains without modification, the sum therein specified, as the amount then due the appellants, is not open to collateral inquiry. That judgment conclusively fixed the sum of \$24,504.39 as the amount due the appellants. So long as that adjudication is allowed to stand, it must be regarded as speaking the exact truth, in respect to the rights and liabilities of all those who were parties to it, so far as their rights, therein involved, existed on the day the decree was given.

A party against whom an unauthorized or inequitable judgment has been obtained, whether by fraud or mistake, can not treat the judgment as invalid until he has taken some proceeding, known to the law, to set it aside, or to secure its modification.

Methods for obtaining a new trial, or to review a judgment for material new matter, or for error of law, are pointed out

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by the statute, and beyond the methods thus prescribed, courts possess inherent power, to an almost unlimited extent, to redress wrongs by modifying or setting aside judgments obtained by fraud or mistake.

These methods, however, all contemplate proceedings in the case in which the unauthorized judgment is alleged to have been obtained. They give no countenance to the notion, that a judgment, however wrongfully obtained, may be ignored, and the rights of the parties again inquired into, in a collateral proceeding. So long as the judgment stands, not being void, it concludes the parties upon the subjects therein determined. *United States v. Throckmorton*, 98 U. S. 61; *Krekeler v. Ritter*, 62 N. Y. 372; *Aurora City v. West*, 7 Wall. 82; *Wiley v. Pavey*, 61 Ind. 457 (28 Am. R. 677); *Cavanaugh v. Smith*, 84 Ind. 380; *Reid v. Mitchell*, 93 Ind. 469; *Freeman Judg.*, secs. 334, 287-9; *Bigelow Estop.* 148-9.

The case before us must, therefore, be determined with the fact in view, that the rights of the parties, so far as they were involved in the proceeding which settled the appellee's right to repurchase or redeem lot 34, are conclusively settled by that decree.

That adjudication determined that there was due the appellants, on the date of the decree, the sum of \$24,504.39. That is to be accepted as the fact, as it then existed, and is not to be the subject of further inquiry.

It does not follow that the appellee is not entitled to recover the money he has been compelled to pay in order to protect the title he acquired as a result of the decree.

The amount required to be paid in order to redeem from the Bissell sale, was a specified sum, ascertained to be due at a given date. That sum was reckoned upon the basis that the appellants had, by paying off the Bissell claim, acquired his right, and occupied his place. The result of the decree was, that a redemption could only be had upon paying the sum so found to be due. It was equally a result of the decree, that when the sum so ascertained should thereafter be

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paid, the person so paying should acquire the title to out-lot 34, in the same right that it was held under the Bissell sale. The amount of the purchase-money due on the Bissell sale, inclusive of interest, costs, expenses, and improvements made to the property, under the Hudson contract, less the amount of rents received by the appellants, was adjudged to be the sum above stated. The appellants, however, had not in fact paid the whole amount due Bissell. Of the sum treated as actually paid to Bissell, \$11,000 was paid by the notes of the appellants, which notes were secured by mortgages on the property to be redeemed. This \$11,000, so secured, was all included in, and went to make up the aggregate of \$24,504.39, the amount found due the appellants. It was mutually arranged that \$10,000 of this amount might be liquidated by the appellee's assumption of the appellants' debt, which was secured by the mortgage on the Hudson residence.

In reference to the \$1,000 secured on lot 6, no arrangement was made. That sum, as the whole might have been, was treated as having been actually paid. Instead of reserving the right to assume and pay that off, the appellee paid the amount with the residue, except the \$10,000, to the appellants. That was in strict compliance with the terms of the decree and with the rights of the parties. Having received the money, it became the duty of the appellants to pay off their debt, and relieve the appellee's property from the encumbrance. Failing to do so, the appellee has been compelled to pay the appellants' debt in order to protect his title.

This, therefore, presents the ordinary case of one person paying a debt for which another was personally and primarily liable, in order to protect his own property. In such a case, the person so paying is entitled to recover from one whose default has imposed upon him the burden of paying a debt, for which he was neither legally nor equitably liable. *Dunning v. Seward*, 90 Ind. 63, and cases cited; 3 Pomeroy Eq. Juris., section 1300.

One who, for the protection of his own property, is com-

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pelled to pay a debt to which he is a stranger, and for the payment of which another is either legally or equitably bound, becomes entitled, on the principles of subrogation, to avail himself of all the remedies to which the person to whom payment was made was entitled. Or he may maintain an equitable suit as for money paid to the use of the other. *Brice's Appeal*, 95 Pa. St. 145; *Stiger v. Bent*, 111 Ill. 328; *Binford v. Adams*, 104 Ind. 41.

Where money has been paid in pursuance of a judgment, such judgment can not be interposed to prevent a recovery, in case the person receiving the money so paid fails to discharge an obligation against himself, which obligation, as a result of the same judgment, it became his duty to pay out of the money so received.

The application of the foregoing principles affords a solution of all the questions presented for consideration in this case. It leaves the case entirely clear of any questions relating to an attack upon the former decree, and it involves in its consideration no question of fraud or mistake in taking the account between the parties, at the time the decree was given. The liability of the appellants arises out of omissions and defaults, which have occurred since the rendition of the decree.

In any event, whether the mortgage on lot 6 was treated as actually paid by the appellants or not, the amount found due could not have been varied a farthing from the sum specified in the decree. If the appellee had known that the mortgage was not paid, he might, or might not, have arranged to assume that, as he did the encumbrance on the Hudson residence. Whatever he might have done in that regard, would have been the result of an agreement with the appellants, rather than by force of the decree. Having paid the money to the appellants, as they demanded, and had the right to demand, and they having refused to pay their debt. as was their duty, the right of the appellee to recover the amount which the appellants' default imposed upon him,

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follows from the application of plain and well settled principles.

What has been said disposes of the questions discussed in respect to the answer and cross complaint of the appellants, as well as all other questions in the case.

The decree, which conclusively settled the amount due the appellants, was equally conclusive as to the rights of the appellee in the property then in controversy. By its terms the appellee became entitled, upon payment of the sum fixed within the time limited, to a conveyance which vested in him an absolute title to the whole of the property, free from any encumbrance placed thereon by the appellants. That he subsequently realized out of the sale of the property repurchased a sum more than sufficient to reimburse himself, including the amount paid to redeem lot 6 from the appellants' debt, is no answer to the complaint, nor can that fact supply the basis of a cross action in favor of the appellants for an accounting.

The judgment is affirmed, with costs.

Filed Dec. 7, 1886; petition for a rehearing overruled Mar. 8, 1887.

No. 12,516.

CALDWELL ET AL. v. BOYD.

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139	610
109	447
154	89

WILL.—Trust.—Advancement by Trustee.—Assignment of Income by Beneficiary.—Where a testator sets apart a fund to be held in trust for the use of a son, the interest to be paid to him semi-annually during life, and at his death the principal to go to his heirs, an assignment to the trustee by the beneficiary of future income to secure an advancement of money, is valid in the absence of fraud and of any testamentary or statutory restriction of the power of alienation.

SAME.—Fraud.—Loan by Trustee to Son.—It is not a fraud *per se* for a trustee to loan a part of the trust fund to his son, if the loan is well secured.

Caldwell *et al.* v. Boyd.

SPECIAL FINDING.—*Fraud.*—Fraud is a question of fact, and in a special finding in a case where it is in issue, the fact itself must be found, and not the evidence of fraud.

From the Henry Circuit Court.

J. Brown, W. A. Brown, J. M. Brown, R. Warner, C. E. Barrett, C. A. Ray, F. Knefler and J. S. Berryhill, for appellants.

D. Turpie, J. C. Denny, I. L. Bloomer, J. H. Mellett, E. H. Bundy, T. B. Redding and W. Grose, for appellee.

Howk, J.—In this cause, errors are assigned here by appellants, the defendants below, which call in question (1) the correctness of the court's conclusions of law upon its special finding of facts, and (2) the overruling of their motion for a new trial.

After the cause was put at issue, it was tried by the court; and at the request of all the parties, the court made a special finding of the facts, and thereon stated its conclusions of law. The facts found by the court were substantially as follows:

1. One Eli Davis by his last will, which was probated in the year 1871, directed that \$20,000 be set apart and held by his administrator, or such trustee or trustees as might be appointed by the court having probate jurisdiction, to be held in trust under the direction and supervision of such court, for the use of his son, Clinton Davis, during his natural life; the interest thereon to be paid semi-annually to said Clinton Davis until his death, the principal then to go to his heirs. (A copy of such will is then set out, which we omit.)

2. The defendant Caldwell was by the proper court duly appointed trustee to receive and manage said fund. He accepted such appointment and qualified as such trustee, on the 24th day of July, 1872. On the 30th day of April, 1873, he filed in the Henry Circuit Court an inventory of the assets of said trust fund, charging himself with \$20,000 of principal and \$555.81 interest received by him to that date.

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He made other reports to the court, from time to time, all of which were examined and approved.

3. On the 6th day of October, 1875, he filed in said court his written resignation of said trust, and the court appointed one Martin L. Bundy as his successor. On the 26th day of January, 1876, he filed in said court his final settlement report and a receipt from his successor, Bundy, for the residue of the trust fund remaining in his hands, which report was approved by the court, and he was finally discharged. Subsequently thereto and before the bringing of this suit, said Bundy resigned, and the plaintiff in this action was appointed to succeed him.

4. Among the assets turned over by the defendant Caldwell to his successor, Bundy, were three notes for \$1,200 each, executed to him as such trustee by one Lewis V. Caldwell, on the 20th day of July, 1875, payable respectively in one, two and three years from date, with interest at the rate of ten per cent. per annum, on which the interest had been paid to July 20th, 1877. These notes were all secured by a mortgage on a certain eighty acre tract of land in Rush county, Indiana. The facts in relation to said loan and said mortgage are as follows: On said 20th day of July, 1875, the defendant Caldwell, being the owner of said mortgaged land, conveyed the same to said Lewis V. Caldwell, who was his son, for the agreed price of \$5,200. The defendant retained the \$3,600 evidenced by his son's notes and secured by mortgage on the land so conveyed, but by what arrangement or upon what kind of an agreement, does not appear. Default having been made in the payment of such three notes, suit was instituted thereon, and for the foreclosure of such mortgage, by Bundy as trustee, against Lewis V. Caldwell and his wife, and the defendant Caldwell, in the Rush Circuit Court; and such proceedings were had in such suit that, on March 5th, 1878, the court rendered judgment therein, in favor of such trustee, for \$3,820, the amount found due on

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such three notes, and decreed the foreclosure of such mortgage and the sale of the mortgaged land, and appointed a receiver to collect the rents of such land and apply the same to the payment of the mortgage debt.

Afterwards, Lewis V. Caldwell having died intestate, on a complaint filed for that purpose against the widow and heirs at law of such decedent, the Rush Circuit Court, on the 4th day of June, 1879, revived such judgment and decree against them, and found there was then due thereon the sum of \$4,161. Under an order of sale issued on such revived judgment and decree, the lands described therein were sold by the sheriff of Rush county according to law, on the 2d day of August, 1879, at which sale appellee, Boyd, trustee for said fund, became the purchaser for the sum of \$3,800, out of which sum, after the payment of the costs, there was credited on such judgment and decree \$3,670.60, leaving a balance of \$525 yet due on such judgment and decree and wholly unpaid.

5. After appellee, as trustee for such fund, had received a deed from the sheriff of Rush county for the land so purchased, he sold such land under an order of the proper court, on the 15th day of April, 1881, to one Joseph Carter for the sum of \$4,000. Such sale was made at an expense of \$65 to the fund, but the trustee had in the meantime received \$76.50 from timber sold, and \$175 from rent of the land. At the time of the foreclosure sale of such land, it was worth \$4,500.

6. Among the assets turned over by appellant Caldwell, at the time of making his final settlement report, to his successor in the trust, was an open account against the beneficiary, Clinton Davis, for the sum of \$1,618.79, for which sum he received credit on making his final settlement. The sum originally owing to the appellant Caldwell, from the beneficiary in the trust fund, was \$1,978 as shown by a written agreement between them made on the 22d day of July, 1874, in the words and figures following: (Here a copy of

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such agreement is set out, which we omit, but give a summary of all that is material therein.) The agreement contained an itemized statement of the moneys paid by Caldwell to or for the beneficiary, and of the debts of the latter assumed by the former, amounting in the aggregate to said sum of \$1,978. It is then stated therein, that Clinton Davis had, on that day, assigned to Caldwell, as collateral security for the repayment of such moneys and debts, a policy of insurance on his life, in the Franklin Life Insurance Company of Indianapolis, for \$2,500, and that the annual premiums due thereon were to be paid by Caldwell out of the interest in his hands belonging to said Davis. The agreement then proceeds as follows:

"Now the said Clinton Davis hereby orders and directs the said James L. Caldwell, as such trustee, out of the interest so due to him semi-annually out of said trust fund, first to retain and pay all the charges and expenses incident to said trust, including taxes, and also the premium as the same becomes due on said policy of insurance; secondly, to pay to said Clinton Davis, on the 20th of January, 1875, the sum of \$350, and on the 20th day of July, 1875, \$350, and \$300 semi-annually thereafter, until the foregoing amount of \$1,978 shall be paid: and the said Clinton Davis hereby agrees, orders and directs the said James L. Caldwell to retain all the residue of said semi-annual interest as the same becomes due, and apply the same to said sum of \$1,978, with interest thereon at the rate of ten per cent. per annum from the date hereof, until the whole of said sum, including the interest, shall be fully paid. July 22d, 1874.

(Signed) "CLINTON DAVIS."

The said account had been reduced by payments and credits to \$1,618.79, at the time the defendant made final settlement of his trust.

7. At the time of his resignation and final settlement, the defendant turned the above mentioned account over to his successor, who has at all times since had possession thereof,

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and at the same time he also turned over the policy of life insurance above mentioned to his successor in the trust.

8. Defendant Caldwell in good faith paid for, and advanced to, the said Clinton Davis the said sums of money, set out in said settlement, and no part thereof was ever repaid to him, except as above found. The beneficiary, Clinton Davis, at the time said sums of money were loaned to and paid for him by defendant, was insolvent and a reckless spendthrift, wholly unfit to be trusted with money, all of which was known to defendant; but said Davis had sufficient mental capacity and will power to transact the ordinary business of life. At the time said sums were advanced to and paid for the beneficiary, the only reasonable assurance the defendant had that the same would ever be repaid to him, was the agreement of said Davis that the interest on the fund coming to him, as beneficiary, might be retained by the trustee and applied to the liquidation of said indebtedness, and in case of his death before the full payment thereof, that the fund should be reimbursed from the proceeds of said policy of insurance. The successors of the defendant have not retained the interest from the fund for the purpose of applying the same to the liquidation of said indebtedness, but have regularly paid such interest, as it fell due, to said Clinton Davis, though they had the power under said contract to have done so, and had they done so the fund would long ago have been fully reimbursed for all the sums so loaned and advanced to said Clinton Davis.

Upon the foregoing facts, the court stated the following conclusions of law:

1. The plaintiff is entitled to recover of the defendant the said sum of \$525, being the difference between the amount due on said decree of foreclosure, and the sum for which the mortgaged lands were bid in at the sale thereof under such sale, with interest thereon at the rate of ten per cent. per annum from the date of said sale, to wit, August 2d, 1879, collectible without relief from appraisement laws.

2. The defendant is not liable to account further for the

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money, so paid to and advanced for the said Clinton Davis, out of the principal of said trust fund.

Appellant excepted to the first of these conclusions of law, while appellee excepted to the second conclusion of law. Over these exceptions, the trial court rendered judgment upon, and in accordance with, its first conclusion of law, in appellee's favor and against the appellant. From this judgment the appellant alone has appealed to this court, and has here assigned as error, among others, that the trial court erred in its first conclusion of law.

Appellee has also assigned here a number of cross errors, and, among others, that the trial court erred in its second conclusion of law.

All the questions of law, at issue between the parties in this cause, are fully and fairly presented for our decision, as well for appellee as for appellant, by the errors which each of them, as we have stated, has predicated upon one or the other of the court's conclusions of law upon its special finding of facts.

In our consideration of this cause, therefore, we shall confine our opinion to the decision of the questions of law, which are presented by, or arise under, the error and cross error which are based respectively upon the two conclusions of law. We will first consider the questions presented by the cross error, assigned by appellee upon the second conclusion of law.

We have heretofore given a full summary of the facts found specially by the trial court, except that we did not set out a copy of the last will of Eli Davis, deceased, or of the first item of such will, which created the trust in favor of Clinton Davis, of which appellant was a former trustee, and of which at the commencement of this suit, and since, appellee was the trustee. We set out here so much of the first item of Eli Davis's will, as is necessary to a proper understanding of the question arising under appellee's cross error, as follows :

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"First. I will and direct that forty thousand dollars be set apart and held by my administrators, or such trustee or trustees as may be appointed by the court having probate jurisdiction, to be held in trust under the direction and supervision of said court, for the use of my sons Harvey Davis and Clinton Davis, in equal amounts, during their natural lives, the interest thereon to be paid to them semi-annually by said trustee or trustees, and after their deaths, or the death of either one, the principal to go to their heirs, in equal amounts. * * * But it is my express will and direction, that neither of my said sons shall have any portion of the principal of the above sum, except in case of absolute necessity for their support, as above stated."

It was found by the court that Clinton Davis had become indebted to appellant, as trustee of his share of the fund, for moneys paid for and advanced to the beneficiary by the appellant, in good faith; and that to secure and indemnify appellant on account of such indebtedness, the beneficiary executed to the former a written assignment of a part of the semi-annual interest to become due thereafter, until such indebtedness should be fully paid. It was upon this part of the case, and all the facts found in connection therewith, the learned court stated as its second conclusion of law, that appellant was not liable to account further for the moneys so paid to and advanced for Clinton Davis, out of the principal of the trust fund. This conclusion of law is vigorously assailed by appellee's learned counsel, upon the ground, as we understand their argument, that it was not competent for the beneficiary, Clinton Davis, to make a valid assignment in advance of any portion of the interest or income of the trust fund.

Counsel cite a number of decisions of the courts of last resort, in our sister States, which seem to support their position. We do not think it is necessary to examine these decisions, however, because the precise point made was considered and decided by this court adversely to the views of

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appellee's counsel, in *Martin v. Davis*, 82 Ind. 38. In the case cited, the same item of the last will of Eli Davis, deceased, was before this court for consideration in a controversy between Harvey Davis, the other beneficiary in the trust fund, and Simon Martin, the trustee of his share of such fund, and other persons. In that case, the same point was made as the one now made by appellee's counsel; but this court held that either beneficiary could make a valid assignment of the income bequeathed to him, before the time fixed for its payment, the will imposing no restriction in reference thereto. The court there said: "We need not decide in this cause whether the owner of personal property, in a testamentary disposition thereof, may or may not give in trust its income, free from the debts of the beneficiary, or restrain him from the alienation thereof. This will gave the beneficiary an unrestricted interest in the income of the fund during his life, which, where there is no statutory prohibition, as in this case, he may alienate as a whole or in part. *Perry Trusts*, section 386; *Story Eq. Jur.*, sections 974, 1044, 1047; *Wood v. Wallace*, 24 Ind. 226; *Farmers' and Mechanics' Savings Bank v. Brewer*, 27 Conn. 600."

Our conclusion is, therefore, that the trial court did not err in its second conclusion of law upon the facts specially found.

Did the court err in its first conclusion of law? We are of opinion, that this question ought to be, and must be, answered in the affirmative. The whole case against appellant, as stated in appellee's complaint, was founded upon the alleged fraud of appellant, his fraudulent conduct and fraudulent practices, in the discharge of the duties of his trust as trustee of the fund of which Clinton Davis was the beneficiary. The court found that, as trustee, appellant made regular reports of his trust, which were all approved by the proper court, and that, when he resigned his trust, he made his final settlement report to the approval of the court, that he fully settled with his successor in such trust, and that he

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was finally discharged by an order of the court from the duties and liabilities of the trust. But the court wholly failed to find that appellant was guilty of any fraud whatever, or any fraudulent conduct or practices, in the discharge of the duties of his trust. Fraud under our law is always a question of fact, and, when alleged, it must be proved and found as a fact. *Lockwood v. Harding*, 79 Ind. 129; *Morris v. Stern*, 80 Ind. 227.

In a special finding of facts, in a case where alleged fraud is one of the facts in issue, the fact itself must be found by the court, and not the evidence or so-called badges of fraud. *Elston v. Castor*, 101 Ind. 426 (51 Am. R. 754); *Stix v. Sadler*, *ante*, p. 254.

The facts, upon which the first conclusion of law was rested, were not found to be fraudulent. It was not a fraud *per se*, for appellant to loan to his own son a part of the trust fund, if such loan were well secured; and the court found the value of the land, mortgaged to secure such loan, to have been more than sufficient to pay the loan, when the land was bought in by appellee, for the benefit of his trust.

Upon this branch of the case, we conclude that the facts found by the court do not sustain the allegations of appellee's complaint, and, therefore, do not authorize or support the first conclusion of law.

The judgment is reversed with costs, and the cause is remanded with instructions to set aside the first conclusion of law and to restate the same by a finding for defendant below, and to render judgment accordingly.

Filed Jan. 15, 1887; petition for a rehearing overruled March 29, 1887.

Preston *et al.* v. Witherspoon *et al.*

No. 12,843.

PRESTON ET AL. v. WITHERSPOON ET AL.

BAILMENT.—Warehouseman.—Sale.—Commingling of Grain.—Estoppel.—Innocent Purchaser.—Where one deposits wheat for storage, knowing that it is to be commingled with wheat purchased by the owner of the warehouse, and that the latter is selling and publicly shipping from the common mass, he thus confers an apparent ownership and authority to sell, and is estopped to assert title as against an innocent purchaser in the usual course of business.

From the Gibson Circuit Court.

M. W. Fields and *L. C. Embree*, for appellants.

J. E. McCullough, *J. H. Miller* and *J. W. Ewing*, for appellees.

ZOLLARS, J.—The nature of the case sufficiently appears from the special finding of facts made by the court below at the request of appellants.

As the brief of counsel for appellees contains a fuller statement of the facts found than does the brief of counsel for appellants, we take therefrom the following summary, making a few additions thereto :

The defendants, Runcie & Wallace, under the firm name of "The Fort Branch Elevator Company," were engaged at Fort Branch in buying, selling and shipping wheat, and for hire receiving wheat from farmers for storage, and on demand of the depositors were to return to them wheat of a like kind, quality and amount as that deposited, but not the identical wheat.

The company occupied an elevator and warehouse, situated fifty or sixty feet apart. The elevator contained fourteen bins, each holding, when filled, three thousand bushels of wheat, and the warehouse three bins, holding six thousand bushels.

The plaintiffs severally, during the months of June, July and August, 1883, deposited wheat, in amounts set out in the finding. The wheat deposited by the plaintiffs was all de-

109	457
126	331
109	457
140	174
100	457
144	62

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livered at and taken in at the elevator, except two hundred bushels of the plaintiff Preston's wheat, which was taken in and stored at the warehouse.

The company from July 10th, 1883, to March 1st, 1884, received for storage from the plaintiffs and other depositors forty thousand bushels of wheat, and during the same time bought, sold and shipped on their own account fifty-five thousand bushels.

The wheat bought and the wheat deposited was nearly all taken in at the elevator, being hauled there in wagons by the farmers, and unloaded into a common receptacle, and from there elevated to the bins in the elevator, and in this way all the wheat purchased and taken in at the elevator, and all the wheat deposited and stored in the elevator, was mixed and mingled together.

It was the custom of the company to sell wheat from the elevator, and to ship from the elevator in car lots of from one to five cars at a time, the shipments being publicly made from the elevator from day to day and from week to week. The plaintiffs knew that the company was selling wheat, and knew at the time they deposited their wheat, that the custom of the company was to mix wheat purchased and stored, and sell from the common bin.

About the 1st of March, 1884, the company sold and shipped from the warehouse four cars of wheat (two cars of Mediterranean, and two of Fultz,) to the defendants, Witherspoon, Barr & Emison, who were engaged in the milling business at Princeton, Indiana, under the firm name of Witherspoon, Barr & Co.

The Mediterranean wheat was purchased by Runcie & Wallace and stored by them in the warehouse, separate and apart from any wheat of their customers, and also separate and apart from other wheat bought and sold by the elevator company.

The firm of Witherspoon, Barr & Co. purchased and paid the Fort Branch Elevator Company the contract price and

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market value of said wheat, in the due course of business, and without having any knowledge or information that plaintiffs, or any one else, had or claimed to have any interest in or title to the same.

"The Fort Branch Elevator Company," on their own account, from July 10th, 1883, to March 7th, 1884, sold and shipped the fifty-five thousand bushels of wheat bought, and also the forty thousand bushels deposited by the plaintiffs and others, except the four cars sold to Witherspoon, Barr & Co., and the two thousand three hundred and seventy-seven bushels left in the elevator after the company ceased to do business, which was March 7th, 1884. The wheat thus left in the elevator was taken by the depositors and divided *pro rata* among themselves.

A short time before the sale to Witherspoon, Barr & Co., Preston, being in the warehouse with Wallace, said to him: "Where is my wheat?" and Wallace said: "There is all of your wheat," pointing to a pile of wheat in the warehouse, containing three or four thousand bushels. And a few days afterward the plaintiff Preston, and Wallace, went together to Vincennes to sell the wheat, and being unable to realize a satisfactory price, they started back to Fort Branch; and on their way back it was understood that Wallace should stop off at Princeton, and see what was the best offer he could get for the wheat. Wallace stopped off, went to Witherspoon, Barr & Co. and sold the wheat shipped to them a few days afterward.

After it was all paid for and all unloaded except one-third of one car, the plaintiffs made a demand on Witherspoon, Barr & Co., for the wheat, who refused to give it up.

The court found, as a conclusion of law, that the defendants, Witherspoon, Barr & Emison, were not liable to the plaintiffs, or either of them, in any sum whatever, because,

1. The Mediterranean wheat, bought by said Runcie & Wallace, is not of the kind or quality of that deposited by the plaintiffs or either of them.

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2. The facts do not show that the Fultz wheat, so bought by Witherspoon, Barr & Emison, was the wheat of the plaintiffs or either of them.

3. Because (in any view of the facts) Runcie & Wallace were, by the voluntary acts of the plaintiffs, clothed with the apparent title and right to sell, and the said Witherspoon, Barr & Emison were *bona fide* purchasers for value.

The only error assigned by the appellants is, that upon the facts specially found, the trial court erred in its conclusions of law.

Upon the facts found by the trial court, are Witherspoon, Barr & Co. liable to the plaintiffs who deposited wheat with the Fort Branch Elevator Company? That is the question, and the only question for decision here.

In the case of *Rice v. Nixon*, 97 Ind. 97 (49 Am. R. 430), cited by counsel for appellants, the question was, whether, as between the depositors and the warehouseman, the latter should be held as a bailee or as a purchaser of the wheat deposited for storage, which, without his fault and before a demand therefor by the depositors, had been destroyed by fire. The depositors sought to hold him liable as a purchaser, because he had mixed their wheat in a bin with wheat deposited by others, and with wheat purchased by him, and had sold from the common mass. That he had done, in keeping with a custom of his. But of that custom the depositors, prosecuting the action, had no knowledge. There was always in the bin wheat enough to supply all depositors, and at any time before the fire they could have received from the bin all the wheat they had deposited. Upon the facts thus before the court, it was held that the warehouseman was a bailee, and not a purchaser, of the wheat so deposited.

It will be observed, that in that case the wheat deposited had all been deposited in, and the sales made from, a common bin, and that it does not appear whether or not any of the wheat deposited by the plaintiffs in the action remained in

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the bin at the time of the fire. See, also, *Bottenberg v. Nixon*, 97 Ind. 106.

The case of *Schindler v. Westover*, 99 Ind. 395, also cited by appellants' counsel, involved a question of title to wheat, as between the depositors and a mortgagee of the warehouseman. The wheat (five hundred bushels) had been stored to be kept until the 1st of the following July. The depositors requested that their wheat should be kept in a separate bin. That the warehouseman declined, but agreed that the wheat should not be taken from the mill, and that he would return a like amount and a like quality whenever called for by the depositors. The wheat was stored in a bin with the wheat of other depositors, and with wheat bought by the warehouseman, and from the common mass, wheat was taken in the manufacture of flour. Before the 3d day of the following March, all of the wheat so received from the depositors, together with that with which it had been so commingled, had been ground into flour and disposed of by the warehouseman. On that day there were 1,900 bushels of wheat in the mill, and the warehouseman executed a chattel mortgage thereon. The mortgagees, under and by virtue of that mortgage, took possession of and sold the wheat. Before it was removed from the mill the depositors demanded of the warehouseman and the mortgagees, the amount of wheat by them deposited. It was held that the depositors and depositary were tenants in common of the 1,900 bushels of wheat then in the mill; that the title of the depositors to 500 bushels of wheat in the mill was superior to any claim of the depositary, although the identical wheat stored by them had been previously manufactured into flour; that the mortgagees could not, and did not, by virtue of the chattel mortgage, acquire a better title to the wheat mortgaged than the mortgagor had; that upon demand by the depositors for a return of the 500 bushels (so much being then in store), their title thereto was absolute and perfect as against the depositary, or those claiming under him, and that if such demand were refused, they could main-

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tain replevin for the possession of the wheat, or if, after demand for the return of the wheat, the parties in possession should convert the same to their own use, the depositors could maintain an action for the recovery of damages for such wrongful conversion of the wheat.

It will be observed, that in that case the wheat mortgaged was in the mill at the time the mortgage was executed, and at the time the demand was made by the depositors, and that in quantity it was more than equal to the amount stored by the plaintiffs in the action.

In the case before us, the wheat sold by the elevator company to Witherspoon, Barr & Co., was not kept in the same bin, nor in the same building where appellants' wheat was kept, while it was kept by the elevator company. In this regard, the facts in the case differ from the cases abovecited. The warehouse, however, seems to have been used by the elevator company in the transaction of its general business, and was situated but fifty or sixty feet from the elevator.

Whether this difference in the facts of the cases requires a different ruling as to the rights of the depositors and the depositary, as between themselves, is a question we need not here decide. For the purposes of this decision, we may assume that the elevator company held appellants' wheat as bailee.

The agreement was that the elevator company should return to the depositors, not the identical wheat deposited, but wheat of a like kind and quality. Two car loads of the wheat sold to Witherspoon, Barr & Co. was Mediterranean wheat, purchased by the elevator company, and stored in the warehouse, whence it was shipped to the purchasers.

As we understand counsel for appellants, they do not claim that there can be a recovery for that wheat, as it was not of the kind and quality of the wheat stored by appellants. The other two car loads, so sold to Witherspoon, Barr & Co., were Fultz wheat, the same as that stored by appellants.

The case before us differs in other important regards from

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the cases above cited. There, the wheat in question was in the bins where it had been placed upon being stored; in one case, at the time when the fire occurred, and in the other, at the time the mortgage was executed and the demand therefor was made. Here, the wheat in question was not in the possession of the depository, nor was it in the building where it had been stored, at the time the demand therefor was made upon Witherspoon, Barr & Co. On the contrary, Witherspoon, Barr & Co. had purchased it in the usual course of business, and had paid for it, without any knowledge of any claim by appellants; it had been shipped to them, and was in their possession as such innocent purchasers. When appellants stored their wheat, they knew that the custom of the elevator company was to mix all the wheat stored and that purchased by the company in a common bin or bins, and to sell and ship from the common mass. They knew, also, after their wheat had been stored, that the elevator company was selling and shipping wheat from the common mass. It was the custom of that company, as found by the court, to ship from the elevator from one to five cars at a time, the shipments being publicly made from day to day, and from week to week.

We think, as concluded by the court below, that by the voluntary acts of appellants, Runcie & Wallace, the persons composing the elevator company, were clothed with the apparent title and right to sell, and that as Witherspoon, Barr & Co. were innocent purchasers in the usual course of business, they should be protected.

As a general proposition, it is well settled both in law and reason, that no one can convey a better title to property than he has. In other words, no one without title to property can convey title thereto, and thus defeat the claims of the rightful owner. But there are many cases where the owner of property will be estopped to assert his title thereto as against an innocent purchaser for value. We think this is such a case. As we have seen, appellants knew that their wheat was to be,

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and was commingled with wheat purchased by the elevator company, and that that company was selling and publicly shipping from the common mass. They, therefore, knew that others were purchasing the wheat from the elevator company, in the usual course of business, and paying their money therefor. By thus putting their wheat into the possession of the elevator company, and allowing it to sell and ship from the common mass, they clothed that company with an apparent ownership of and authority to sell the wheat, which estops them to assert their title thereto, as against Witherspoon, Barr & Co., who invested their money in good faith, believing that to be a fact which appellants by their conduct permitted to appear to be a fact. *Quick v. Milligan*, 108 Ind. 419, and cases there cited.

As between appellants and the elevator company, the question is, what authority did the elevator company in fact have to sell and dispose of their wheat? As between appellants and Witherspoon, Barr & Co., the question is, with what apparent authority did appellants clothe the elevator company to sell and dispose of their wheat?

In the case of *Cowdrey v. Vandenburg*, 101 U. S. 572, it was said: "The principle is well settled that when the owner of property in any form clothes another with the apparent title or power of disposition, and third parties are thereby induced to deal with him, they shall be protected. * * * * The rights of innocent third parties * * * 'do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance.'"

Either appellants or Witherspoon, Barr & Co. must suffer by the alleged wrong of the elevator company. As between them, the loss ought to fall upon appellants.

Not asking that their identical wheat should be kept for

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them, they trusted to the honesty of the elevator company, that in quantity and quality the amount stored should be returned to them. As between them and the elevator company, they are innocent of wrong or laches. As between them and Witherspoon, Barr & Co., the rule should be applied, that where one of two innocent persons must suffer by the wrong of a third person, he must be the sufferer who put it in the power of the wrong-doer to cause the loss.

In the case of *New York, etc., R. R. Co. v. Schuyler*, 34 N. Y. 30 (69), we find this statement: "It goes back to the celebrated aphorism of Lord HOLT, in *Hern v. Nichols* (1 Salk. 289), 'For seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver, should be a loser than a stranger,' or as more tersely expressed by ASHHURST, J., in *Lickbarrow v. Mason* (2 T. R. 70), 'Whenever one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it.'" See, also, *Quick v. Milligan*, *supra*; *Hunter v. Fitzmaurice*, 102 Ind. 449; *Young v. Bradley*, 68 Ill. 553.

Our attention is called to sections 6526, 6537 and 6541, R. S. 1881. Sections 6526 and 6537 are in the act, as originally passed, providing for licensed warehouses.

As the houses owned and operated by the elevator company are not shown to have been such licensed warehouses, the provisions of that act have no application or relevancy here, if in any event anything therein could in any way affect the rights of innocent purchasers in a case like this.

Section 6541, and the sections following, were in another act, as originally passed, defining who are warehousemen, fixing their rights, liabilities, etc. There is nothing in the act that can affect or destroy the rights of Witherspoon, Barr & Co., being innocent purchasers, under the circumstances of this case.

It is well known that the vast crops of this State are moved
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largely through the agency of elevators. Through them our surplus productions in grain reach the markets, whether in neighboring States, on the seaboard, or abroad. To hold that dealers can not acquire title to grain stored, as appellants' wheat was stored with the elevator company, without the production to them of the receipts issued to depositors, would be to throw a serious and unreasonable obstacle in the way of the sale and transportation of our crops. The statute was not intended to have that effect, nor to affect the rights of innocent purchasers, in a case like this, as were Witherspoon, Barr & Co.

It is argued further, that the conversation between Preston and Wallace in the warehouse, in relation to the wheat then on hand, operated as an appropriation of that wheat. Whatever might have been said of the effect of that conversation under different circumstances, it is sufficient here, that appellants, including Preston, having clothed the elevator company with the apparent ownership of, and the authority to sell the wheat, can not change the rights of innocent third parties by such private negotiations between themselves and the elevator company. As bearing upon that proposition, see the case of *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151.

Judgment affirmed, with costs.

Filed Dec. 21, 1886; petition for a rehearing overruled Feb. 26, 1887.

109 466
126 407
126 461

109 466
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163 514

109 466
166 194

No. 13,595.

LUTZ v. THE CITY OF CRAWFORDSVILLE.

STATUTES.—Construction.—Legislative Intention.—If the Legislature manifests an intention to create a system for the government of any subject, it is the duty of the court to effectuate that intention by such a construction as will make the system consistent in all its parts and uniform in its operation.

Lutz v. The City of Crawfordsville.

CITY.—*Intoxicating Liquor.—Regulation of Sale.—Power to Require License.—Jurisdiction Over Territory Beyond Corporate Limits.*—Under sections 3106 and 3154, R. S. 1881, an incorporated city has power, within its corporate limits and for two miles beyond, to regulate all places where intoxicating liquors are kept for sale to be used on the premises, and to require a license from all keepers of such places, as well those who have a license from the State or county as those who have not.

SAME.—*Power of Legislature to Prescribe Limits of Jurisdiction.*—The Legislature has power to designate the limits over which the jurisdiction of municipal corporations shall extend, and its judgment upon the question is conclusive.

SAME.—*License by Different Jurisdictions.*—The grant of a license by one jurisdiction does not affect the right of another jurisdiction to also exact a license fee, nor authorize the licensee to sell in violation of the law of the other.

From the Montgomery Circuit Court.

J. R. Courtney, for appellant.

W. W. Thornton, for appellee.

ELLIOTT, C. J.—The thirteenth subdivision of section 3106 of the statutes provides that a city shall have power "To regulate and license all inns, taverns, or other places used or kept for public entertainment; also all shops or other places kept for the sale of articles [liquors] to be used in and upon the premises."

Section 3154 provides that the common council shall have jurisdiction, among other things, "to exact license-money from all persons licensed to retail intoxicating liquors by county or State authority; and to regulate all places where intoxicating liquors are sold to be used on the premises," two miles beyond the city limits.

Section 5317 is as follows: "No city or incorporated town shall charge any person who may obtain a license under the provisions of this act more than the following sums for license to sell within their corporate limits: Cities may charge one hundred dollars and incorporated towns one hundred dollars, in addition to the sum provided for hereinbefore."

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It is a familiar rule, that all the parts of a statute upon the same subject shall be construed together, and so construed as to produce consistency and harmony. If the Legislature manifests an intention to create a system for the government of any subject, it is the duty of the court to effectuate that intention by such a construction as will make the system consistent in all its parts, and uniform in its operation. It would violate all rules of logic, as well as settled principles of law, to dissect the system into parts and assign effect to each part irrespective of its effect upon the uniformity and consistency of the entire system. Statutes are to be construed as part of a uniform system, and such a scheme adopted as will give each part its appropriate place, and not destroy uniformity and harmony by cutting the system into disjointed and incongruous parts. *Humphries v. Davis*, 100 Ind. 274, see p. 284 (50 Am. R. 788); Bishop Written Laws, section 242*b*.

The system provided by sections 3106 and 3154 is, that an incorporated city shall have power within its corporate limits, and over a territory two miles beyond those limits, to regulate all shops or other places where intoxicating liquors are kept for sale for use on the premises, and to exact a license from persons keeping such shops.

This is the plain import of the language used, and the system intended to be created is clearly defined. It is not enacted that persons who sell without license shall be punished by the municipal authorities, but that license may be exacted from all persons who sell intoxicating liquor to be used on the premises, and "to regulate all places where intoxicating liquors are sold to be used on the premises." The general authority to regulate would undoubtedly carry the incidental authority to license, under the provisions of section 5317; but we are not left to depend on the force of the term "regulate," for, as the quotation just made clearly shows, section 3154 expressly gives the authority to exact a license from the keepers of shops for the sale of liquor to be

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used on the premises. Nor is the authority dependent upon section 3154 alone, for section 3106 expressly confers authority "To regulate and license all inns, taverns, 'or other places' kept for the sale of liquors to be used in and upon the premises."

The manifest intention was to provide a uniform system for regulating shops where liquors are kept for sale to be used on the premises, and not to provide one system to be enforced inside the corporate boundaries, and another in the territory outside of those boundaries.

Section 5317 does not in any way impair the validity of our conclusion, for that section expressly gives authority to exact a license, but limits it to one hundred dollars. There is no conflict between the provisions of that section and the provisions of the act for the incorporation of cities, so that it in no wise disturbs the uniformity and consistency of the system constructed by the latter act.

We do not think that the act for the incorporation of cities can be construed as applying only to persons who have taken out licenses from the State or county, for it seems very clear to us that a person prosecuted under a city ordinance would not be heard to say that he could not be prosecuted because he had violated the law by refusing to take out a State or county license. It can not be possible that the Legislature meant to put the law-breaker on a better footing than the person who obeys the law. The only natural and reasonable construction of the statute is, that it was intended to invest the municipal authorities with power to regulate places where liquors are sold to be used on the premises, and to exact licenses from all keepers of such places.

The clear implication from the language of section 3154, even if detached from the other parts of the statute, is, that municipal corporations are invested with power to exact licenses from persons who have State or county licenses, as well as all other persons who keep shops for the sale of intoxicating liquor to be used on the premises.

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The grant of authority to regulate is generally construed as conferring, as an incidental power, the authority to exact a license. *Smith v. City of Madison*, 7 Ind. 86; *City of Huntington v. Cheesbro*, 57 Ind. 74; *City of Lawrenceburg v. Wuest*, 16 Ind. 337; *State v. Clarke*, 54 Mo. 17 (14 Am. R. 471); *State v. DeBar*, 58 Mo. 395.

But we are not left to implication here, for the power to exact a license is expressly conferred, and it is not confined to those who have obtained a license from the State or county. It is not so restricted by the words employed, nor is it a necessary implication; on the contrary, as we have already shown, such an implication would lead to an evil result, which, it is easy to see, was never intended by the Legislature.

The Legislature has power to determine what the territorial jurisdiction of the political subdivisions of the State shall be. Judge Dillon says: "With the exception of certain constitutional limitations presently to be noticed, the power of the Legislature over such corporations is supreme and transcendent: it may erect, change, divide, and even abolish them, at pleasure, as it deems the public good to require." 1 Dillon Munic. Corp. (3d ed.), section 54. It is certainly within the power of the Legislature to declare that no unlicensed dram-shop shall be kept within a designated number of feet of the corporate limits; otherwise all that need be done to evade the law would be, to keep a foot or two beyond the corporate boundaries. If the Legislature has any power at all to designate limits over which the jurisdiction of municipal corporations shall extend, then, necessarily, the subject must be within its discretion, and if this be so, its judgment upon the question must be conclusive.

Limitations upon the legislative power are to be sought for in the Constitution, and if not found there they do not exist. *Eastman v. State*, ante, p. 278; *Robinson v. Schenck*, 102 Ind. 307; *Hedderich v. State*, 101 Ind. 564 (51 Am. R. 768). There is nothing in the Constitution prohibiting the Legislature from fixing the jurisdiction of municipal corporations,

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and the judiciary can not supplant the judgment of the Legislature with its own.

The licensing of a shop in which to sell intoxicating liquors, by a municipal corporation, does not, of course, authorize the licensee to sell without a license from the State or county, or from the Federal government. A license is a restriction upon the traffic, and the grant of a license by one jurisdiction does not authorize the person to whom it is granted to violate the law of another jurisdiction. In imposing one restriction there is neither an express nor an implied undertaking that no other jurisdiction shall refrain from imposing a restriction, in the form of a license, upon those engaged in selling intoxicating liquors. Thus, it is well settled, that a grant of a license by the United States does not interfere with the right of the State to restrict the traffic by exacting a license fee or by imposing other restrictions. This principle has been applied to a case like the present by this court. *McKinney v. Town of Salem*, 77 Ind. 213.

The power to exact a license is a police power vested in the sovereign and may be delegated to instrumentalities of government such as municipal corporations are. The purpose of exacting license is to limit and regulate the business, for, if licenses were not required, all persons might, under the rules of the common law, freely engage in the business, but, by imposing a restriction in the form of a license, the traffic is regulated and limited. The principle upon which the power rests is a very ancient one, and is the same as that which for hundreds of years has sustained the right to restrict the business of hawking and peddling by exacting licenses. *Hedderich v. State*, *supra*.

Judgment affirmed.

Filed Feb. 16, 1887.

Roots v. Beck *et al.*

No. 12,879.

ROOTS v. BECK ET AL.

REAL ESTATE, ACTION TO RECOVER.—Title.—Evidence.—Burden on Plaintiff.—The burden is upon the plaintiff in ejectment to make out his title and right of possession by affirmative proof.

SAME.—When Burden on Defendant.—Where the defendant in ejectment pleads in confession and avoidance, and there is a reply in denial, the burden is on him as to the affirmative matter.

SAME.—Adverse Possession.—Color of Title.—Open, notorious, exclusive, uninterrupted and adverse possession, continued for twenty years, without color of title, will confer a complete title, in all respects equal to a conveyance in fee.

SAME.—Statute of Limitations.—The only distinction between titles acquired under the statute of limitations by adverse possession under color of title, and without it, is, that in the latter case title will be limited to actual, visible, continued occupancy, while in the former it may by construction embrace lands only part of which is actually occupied.

From the Fayette Circuit Court.

B. F. Claypool, J. H. Claypool, L. W. Florea and G. C. Florea, for appellant.

R. Conner, H. L. Frost, H. C. Fox and J. F. Robbins, for appellees.

MITCHELL, J.—The appellant's argument for a reversal of the judgment below relates exclusively to the propriety of certain instructions given by the court at the trial.

The action was by Abraham B. Conwell against Francis M. Roots, the first paragraph of the complaint being in ejectment to recover the possession of certain described real estate; the second was to quiet the title to the same land; while a third paragraph was trespass, to recover damages for alleged injuries to the land in dispute.

The defendant below answered specially to the first paragraph of complaint, that he was the owner and in possession of part of the real estate described, and that as to the residue he disclaimed any ownership or possession. To the second and third paragraphs the general issue was pleaded. The plaintiff closed the issues by replying a general denial

109	472
126	506
109	472
133	164
109	472
124	246
135	91
135	250
136	427
136	509

109	472
138	298
109	472
142	222
109	472
145	44
145	48
146	539
146	576

109	472
151	348
152	472
109	472
153	351
109	472
163	554

109	472
166	334

109	472
170	122

to the defendant's special answer to the first paragraph of the complaint.

Having stated the issues substantially as above, the court, in its fifth instruction, told the jury that the plaintiff having by his reply denied the matters set up in the first paragraph of the defendant's answer, the defendant was thereby put upon the proof of the affirmative matter set up in such answer.

This instruction is assailed as erroneous, in that, as the appellant contends, it instructs the jury that the burden of proof was upon the defendant, whereas it is said, in ejectment, the plaintiff must recover upon the strength of his own title, and hence has the burden of showing title in himself before he can recover even as against a defendant in possession without title.

That the proposition contended for is, in the abstract, correct, results from the provisions of section 1057, R. S. 1881, as well as from an often reiterated common law rule. Standing alone, the instruction in question might have been misunderstood, but read in connection with the seventh and tenth, we do not think it could have misled the jury.

In the seventh instruction, the jury were told explicitly, that the first paragraph of the answer to the first paragraph of the complaint put the plaintiff upon the proof of all the material allegations in that paragraph of complaint as were not specially therein admitted, and that to entitle the plaintiff to recover he must prove the material allegations of his complaint, not specially admitted, by a preponderance of the evidence.

The tenth instruction, given at the appellant's request, told the jury that the plaintiff must recover on the strength of his own title, that the burden of proof was upon him to show title to the land, and a right of possession, and that if the plaintiff failed to show title in himself, it would make no difference whether the defendant had title or not.

Taking the instructions all together, we can hardly conceive how the jury could have failed to realize that the neces-

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sity was upon the plaintiff, to make out his title and right of possession by affirmative proof.

There was a sense in which the fifth instruction was not erroneous, as applied to the defendant's special answer. In so far as that answer was a plea in confession and avoidance, admitting the plaintiff's *prima facie* case, and avoiding it by affirmative matter, it was correct to say that the defendant was put to the proof of such affirmative matter. This, we think, is the fair interpretation of the charge. Thus interpreted, it was not erroneous, taken in connection with those which followed.

The eighteenth instruction is said to contain an erroneous statement of the law. It was as follows:

"Under the statute of this State twenty years of continuous, exclusive, uninterrupted, and adverse possession of real estate, not only bars a right of action therefor, but it also confers as complete a title as a written conveyance against every one who is not under legal disability during any part of such time."

This instruction is said to be faulty, in not stating that adverse possession, in order to confer title in fee, under the statute of limitations, must be under color of title. While conceding that color of title is not necessary to constitute an adverse holding, so as to bar an action under the statute of limitations, appellant's counsel nevertheless contend that in order to acquire a title in fee by adverse possession, the occupancy must have been under claim or color of title.

Some of the earlier cases seem to recognize the distinction contended for. The later decisions, however, leave little room for contention.

An open, notorious, exclusive, uninterrupted, and adverse possession, continued for the period of twenty years, is effectual to confer a complete title on the person so occupying, and it is not essential that such possession should have been under color of title. *State v. Portsmouth Savings Bank*, 106 Ind. 435; *Sims v. City of Frankfort*, 79 Ind. 446; *Brown v. An-*

Alderson, 90 Ind. 93, and cases cited; *Hargis v. Inhabitants*, etc., 29 Ind. 70; *Bauman v. Grubbs*, 26 Ind. 419.

The acquisition of title to land by adverse occupancy is predicated upon the statute of limitations. The effect of the statute is such that the continuous and uninterrupted adverse occupancy of land for a period of twenty years operates to extinguish the title of the real owner, and vests the person so occupying with a title in fee simple. Sedg. & Wait Trial of Title to Land, sections 726, 727.

The bar of the statute having become complete, the rights of the person entitled to its benefits are as complete as though he were invested with an actual title. A title so acquired is equally available, whether it is used as a shield for the purposes of defence, or to recover a possession lost after such title has fully matured.

Some of the apparent confusion in the cases, which has been remarked upon, grows out of the difference between that peculiar hostile possession which formerly rendered conveyances executed by parties out of possession void, as respects persons occupying the land adversely, and that undisturbed possession which by the efflux of time will ripen into a title. The former required possession under color of title. The latter might originate without claim or color of title. The fact of possession, and the intention with which it was commenced and held, are the only tests as to whether a possession be adverse or not. *Davenport v. Sebring*, 52 Iowa, 364.

Any adverse possession, the effect of which is to oust the true owner, and give to him a right of action, sets the statute of limitations in motion. When the bar of the statute becomes complete, however destitute of the color of title such occupancy may have been, to the extent that it was actual, visible and continuous, a title by prescription arises in the adverse occupant. This title is in all respects equal to a conveyance in fee.

The only distinction which can be recognized between title acquired under the statute of limitations by adverse occu-

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pancy, under claim and color of title, and without such claim or color, is, that in the latter case title will only be co-extensive with actual, visible, continued occupancy, while in the former color of title may by construction embrace lands only part of which was thus actually occupied. *State v. Portsmouth Savings Bank, supra.*

There was no error in the instruction.

The judgment is affirmed, with costs.

Filed Jan. 5, 1887; petition for a rehearing overruled Feb. 26, 1887.

 No. 11,813.

ALLEN ET AL. v. CRAFT ET AL.

WILL.—Trust.—Control and Disposition.—A devise to a trustee, with no power of control or disposition, is ineffective, and the estate vests directly in the beneficiary.

SAME.—Estate Tail.—That which would have been an estate tail at common law is an absolute estate in fee, under the statutes of this State.

SAME.—Rule in Shelley's Case.—A devise to M. A. "and her heirs forever," where it appears that the word "heirs" was used as a word of limitation, vests in the first taker, under the rule in Shelley's case, an estate in fee.

SAME.—Use of Word "Heirs."—Intention of Testator.—The word "heirs" has a fixed, legal meaning, and can only be held to mean children, or to be a word of purchase, when it is clear that such was the intention of the testator.

SAME.—When the word "heirs" is used as a word of limitation, it is treated as conclusively expressing the intention of the testator.

SAME.—Superadded Words.—Superadded words which merely describe or specify the incidents of the estate created by such a word of limitation as the word "heirs," do not cut down the interest of the devisee.

SAME.—Issue.—The word "issue" is ordinarily a word of limitation of the same force as the word "heirs."

SAME.—Estate in Fee.—Restriction Upon Right to Alienate.—Where an estate

109	476
194	370
197	309
109	476
181	388
109	476
126	388
109	476
141	176
143	259
109	476
145	196
146	480
147	97
109	476
155	287
155	289
109	476
180	120
180	121
180	122
109	476
168	172
168	173
109	476
1171	384

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in fee is created, a general restriction upon the right of alienation is without effect.

Howk, J., dissents.

From the Laporte Circuit Court.

W. B. Biddle and C. H. Truesdell, for appellants.

M. H. Weir, E. E. Weir, J. Bradley, J. H. Bradley, D. J. Wile and F. E. Osborn, for appellees.

ELLIOTT, C. J.—The second item of the will of Catharine Allen reads thus:

"Secondly. I devise and bequeath unto John Allen, of Xenia, in Greene county, in the State of Ohio, in trust for Mrs. Matilda Allen, the present wife of my son, Mark Allen, and her heirs forever, the following real estate, to wit: The south half of section 28, in township 36 north, of range 3 west, situate and lying and being in the county of Laporte, aforesaid. And I hereby direct that the said Matilda shall have the sole use, control, benefit and profits thereof, free and clear of and from her said husband, my son, Mark Allen, and free and clear of all interference on his part in the management thereof, the receipt of profits arising therefrom, and in all matters whatsoever during her natural life, and at and after her death, then the heirs of her body shall in all things control and manage the same and receive the rents and profits arising therefrom: *Provided*, nevertheless, that upon the death of my son, Mark, if my said daughter, Matilda, should survive him, the heirs of her body then living and in being shall thenceforward be entitled to receive two-thirds of the profits thereof, to be equally divided between them, and should the said Matilda marry again, then the heirs of her body then in being shall thenceforward manage and control the said land, still giving to my said daughter one-third of the profits during her natural life, but in no case shall the issue of my daughter, Matilda, by any marriage other than with my son, Mark, be entitled to inherit anything under or by virtue of this will, but I expressly prohibit them there-

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from, and in case that my daughter, Matilda, shall survive her present husband, she shall not after his death alienate the said estate."

The designation of John Allen as trustee is ineffective, inasmuch as no power of control or disposition is vested in him. The estate, whatever its character, devised to Matilda Allen vests directly in her. This is the effect of the statute, as the trust is a mere naked one. R. S. 1843, p. 447, sec. 181; R. S. 1881, sec. 2981.

The controlling question in the case is as to the nature of the estate devised to Matilda Allen. If the estate devised is a fee, then the judgment below was right; if not, the judgment is wrong and must be reversed.

The contention of appellees' counsel, that if the estate devised would have been an estate tail at common law, it is an estate in fee simple under our statute, must prevail. R. S. 1843, 424, section 56; R. S. 1881, section 2958; *Tipton v. La Rose*, 27 Ind. 484.

There were at common law two kinds of estates tail, general and special. Blackstone thus describes the latter: "Tenant in tail special is where the gift is restrained to certain heirs of the donee's body, and does not go to all of them in general." 2 Blackstone Com. 113.

In this instance, if the estate devised is an estate tail, it is a special one, for the words of the will restrain the persons who shall take to those begotten by the son of the testatrix and the husband of the donee. The inquiry as to whether the estate tail, conceding that this is the estate created by the devise, is a special or a general one, is important only for the purpose of showing that a limitation to a designated class of heirs does not cut down the estate of the first taker to less than a fee, for the estate is a fee although the limitation may be to a designated class of heirs to the exclusion of all others. It results from this rule of law, that the limitation to the heirs of the body of Matilda Allen, begotten by Mark Allen, does not, in itself, further affect the devise than to make it

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what at common law would be an estate tail special, but if it be such an estate at common law, then, by force of our statute, it is an absolute estate in fee, since all estates tail are transformed into fees absolute.

What we have said disposes of the clause limiting the inheritance to the heirs begotten by Mark Allen, considered in itself and apart from the other provisions of the will, and we proceed to analyze and discuss the other provisions of the instrument.

It is firmly established by our decisions, that the rule in Shelley's case is the law of this State. In one case the court declared and enforced this rule, but expressed the hope that it might be changed by legislation, avowing that it was not within the power of the court to change it, much as the court doubted its wisdom and justice. *Siceloff v. Redman*, 26 Ind. 251, see p. 259. But the rule has been so repeatedly and emphatically declared to be a rule of property, that it is no longer a question as to its binding force upon the courts of the State. *Hochstedler v. Hochstedler*, 108 Ind. 506; *Fountain County, etc., Co. v. Beckleheimer*, 102 Ind. 76 (52 Am. R. 645), and auth. cited p. 77; *Shimer v. Mann*, 99 Ind. 190 (50 Am. R. 82); *Ridgeway v. Lanphear*, 99 Ind. 251; *Biggs v. McCarty*, 86 Ind. 352 (44 Am. R. 320); *McCray v. Lipp*, 35 Ind. 116; *Andrews v. Spurlin*, 35 Ind. 262; *Doe v. Jackman*, 5 Ind. 283.

The clause in the will containing the words "unto Matilda Allen and her heirs forever," if it stood alone, would unquestionably carry the case far within the rule in Shelley's case. *Shimer v. Mann*, *supra*, and cases cited; *Hochstedler v. Hochstedler*, *supra*. The clause can not, however, be severed from those with which it is associated, but must be considered in conjunction with them.

We have no doubt that a clause creating an estate in fee may be so modified by other clauses as to cut down the estate to one for life, but to have this effect the modifying clauses must be as clear and decisive as that which creates the estate.

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Hochstedler v. Hochstedler, *supra*; *Bailey v. Sanger*, 108 Ind. 264; *Thornhill v. Hall*, 2 Clark & F. 22; *Collins v. Collins*, 40 Ohio St. 353; *Lambe v. Eames*, L. R. 10 Eq. Cases, 267; *Clarke v. Leupp*, 88 N. Y. 228; *Roseboom v. Roseboom*, 81 N. Y. 356; *Freeman v. Coit*, 96 N. Y. 63.

If the other words of the will are as strong and clear as those of the clause "unto Matilda Allen and her heirs forever," then it may well be held that the estate is less than a fee. The word "heirs" is, as Mr. Preston says, the "most powerful" that can be employed, and this our cases recognize. *Shimer v. Mann*, *supra*, and cases cited. *Hochstedler v. Hochstedler*, *supra*.

Strong as is the word "heirs," it may be read to mean children, if the context decisively shows that it was employed in that sense by the testator. *Ridgeway v. Lanphear*, *supra*; *Shimer v. Mann*, *supra*; *Hadlock v. Gray*, 104 Ind. 596. But there must be no doubt as to the intention of the testator to affix to the word "heirs" a meaning different from that assigned it by law. *Shimer v. Mann*, *supra*; *Jessen v. Wright*, 2 Bligh (H. L. Cases), 1, 56; *Doe v. Gallini*, 5 B. & Ad. 621; *Lees v. Mosly*, 1 Y. & Coll. Exch. Cases, 589; *Powell v. Board, etc.*, 49 Pa. St. 46, 53; *Den v. Emans*, Penn. (N. J.) 967; *Robins v. Quinliven*, 79 Pa. St. 333.

It appears from these principles, that the words employed in the clause "unto Matilda Allen and her heirs" must prevail to carry a fee, unless we find equally clear and decisive terms cutting down the estate, and this is not possible unless, as said in one of the cases cited, the intent to employ the word "heirs" in a different meaning from that assigned it by law is so plain that nobody can misunderstand it. Our search then must be made with these rules as our guide.

The clause which gives to Matilda Allen the sole control of the estate during life, and after her death "then to the heirs of her body," is but a reiteration of the meaning conveyed by the clause we have already discussed, for in themselves they carry a fee, as the powerful term "heirs" is still

employed. Proceeding with our analysis, we come to the clause, "Provided, nevertheless, that upon the death of my son, Mark, if my daughter should survive him, the heirs of her body then living shall thenceforth be entitled to receive two-thirds of the profits thereof, to be equally divided among them, but should the said Matilda marry again then the heirs of her body then in being shall thenceforward manage and control the land, still giving to my daughter one-third of the profits thereof during her natural life, but in no case shall the issue of my daughter by any marriage other than with my son, Mark, inherit anything under or by virtue of this will, but I expressly prohibit them therefrom, and in case that my daughter, Matilda, should survive her present husband, she shall not after his death alienate the said estate."

The introductory clause in which the word "heirs" occurs undoubtedly shows, if taken by itself, that the word was not used as signifying heirs in the legal sense of the word, but we can not separate this clause from the other members of the sentence, and considered, as undeniably it must be, in connection with them, it must yield. This we say because in the clause blended with it is the word "issue," and this is ordinarily a word of limitation of the same force as the word "heirs."

In *Quackenbos v. Kingsland*, 102 N. Y. 128 (55 Am. R. 771), the words of the will were: "I give, devise and bequeath unto my son, Daniel Kingsland, and to his heirs; but in case my son Daniel should die without lawful issue, I give and bequeath it to my remaining children," and it was held that Daniel took an estate in fee. The definition of the word "issue" was tersely stated by Lord ELDON in *Sibley v. Perry*, 7 Vesey, 522, for he said: "Upon all the cases this word *prima facie* will take in descendants beyond immediate issue."

In *Powell v. Board, etc.*, 49 Pa. St. 46, it was said: "Un-
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doubtedly in a will the word 'issue' is regarded as primarily a word of limitation, and as synonymous with the technical words 'heirs of the body.' Hence it is presumed that when a testator devises an estate for life, with a remainder to the issue of the devisee of that estate, he intends the remaindermen to take as heirs of the body by descent from their ancestor, rather than as purchasers, themselves the root of a new succession."

To a like effect is the statement in *Den v. Emans*, Penn. (N. J.) 967, 971, that "The word *issue*, in a devise, as a word of limitation, is synonymous to heir; it is *nomen collectivum*, and takes in the whole generation."

In *Robins v. Quinliven*, 79 Pa. St. 333, these words were used: "The word 'issue' in a will *prima facie* means 'heirs of the body,' and in the absence of explanatory words showing that it was used in a restricted sense, is to be construed as a word of limitation."

In *Carroll v. Burns*, 15 Weekly Notes of Cas. 553 (55 Am. R. 778, n.), it is said: "The rule is unquestioned that *prima facie* in a will, the word issue means 'heirs of the body,' and will be construed as a word of limitation, unless there be explanatory words showing it was used in a restricted sense."

These decisions, to which many more might be added, do no more than give expression to a long-existing and well-known principle, and the rule, affixing to the term "issue" the meaning expressed in these cases, requires that the term, as used in the will before us, should be deemed to mean "heirs," in the sense in which that term is employed in the clause of the will which reads "unto Matilda Allen and her heirs forever." Hawkins Wills, 189.

It is contended, however, that the restriction upon the power of alienation evinces an intention to devise only a life-estate to Matilda Allen. But it is to be noted, that the language in which the restriction is expressed is ambiguous, if, indeed, the only just meaning that can be put

upon it is not adverse to the appellant's contention. The restriction is, not that Matilda shall in no event alienate the land, but that she shall not do so in one event, that is, in the event that she survives her husband. The clear implication is, that during her husband's life she was empowered to alienate the land, so that, so far as the question of alienation is concerned, the words of this part of the will are not inconsistent with those which so clearly and decisively create an estate in fee. If only a life-estate was intended to be vested in the first taker, then there was no reason for imposing a restraint upon the power of alienation. But, under the rule of which we have spoken, we can not enter into conjectures as to the effect of the clause respecting the power of alienation, for, unless it can be affirmed that the clause is as clear and decisive as that which creates the estate, the estate can not be cut down. It would have been impossible to have found in all the domain of legal terminology stronger words than those employed, "to Matilda Allen and her heirs forever," and they must control the feeble influence of the clause which attempts to limit the right of Mrs. Allen to alienate the land devised to her.

There is another principle in the law of real property, which exerts a controlling influence here, and that is this: Where an estate in fee is created in clear and decisive terms, a restriction upon the right of alienation is of no effect. There may be a partial restriction, but there can not be a general one. This must be so, or else reason and logic must be disregarded, for a fee simple necessarily implies absolute dominion over the land, and this can not exist if the power of disposition is hampered by a restriction destroying the absolute dominion inherent in the owner of the fee. *McWilliams v. Nisly*, 2 S. & R. 507; *Moore v. Shultz*, 13 Pa. St. 98; *De Peyster v. Michael*, 6 N. Y. 467; *Mandlebaum v. McDonell*, 29 Mich. 78; 4 Kent Com. 5.

Undoubtedly the cardinal rule in the construction of wills is, that the intention of the testator shall prevail; but where

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words are used which have a settled legal meaning, full effect must be given to them.

The cases go very far upon this question. Thus, in *Doe v. Jackman*, 5 Ind. 283, it was said: "But the term 'heirs' is one of limitation. It has a fixed and legal meaning, and a mere presumed intention will not control its signification. It can not be held a word of purchase, unless the testator's intent so to use it appears manifest."

In *McCray v. Lipp*, *supra*, the court said: "Under the rule in Shelley's case, the fee passes in opposition to the apparent intention of the testator."

This court, in *Siceloff v. Redman*, *supra*, said: "Although from this language it is apparent that the testator intended that Virginia should take a life-estate only, and that her heirs should take after her death, and as the estate so intended to be granted to Virginia would terminate at her death, and could not, therefore, descend to her heirs, it would seem apparent that the testator intended that the heirs should take directly from him, as purchasers, and not by descent from the ancestor; yet, by the technical meaning applied to the word heirs, under the rule in Shelley's case, this apparent intention is denominated a presumed intent, and is not allowed to control the technical meaning of the word heirs, or in other words, despite the apparent intent of the testator, the rule gives the fee to the ancestor."

Again, in the case of *Gonzales v. Barton*, 45 Ind. 295, the court said: "If the question could be regarded as one of intention, there would be no difficulty in coming to the conclusion that in this case it was intended that Morey should take a life-estate only. But such is not the rule, as may be seen by reference to the cases cited as having been decided in this court."

Mr. Fearne states the rule very strongly, perhaps too strongly, for he says that the most positive direction will not defeat the operation of the rule in Shelley's case. 2 Fearne Remainders, sec. 453.

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Judge SHARSWOOD, in delivering the opinion of the Supreme Court, in *Ingersoll's Appeal*, 86 Pa. St. 240, 245, said: "Nothing certainly is better settled than that the intention of a testator, if not contrary to law, shall be carried out in the disposition he may make of his property after death. There are many things which he can not do, however clearly he may intend it. He can not create a fee and clog the power of alienation or relieve it from liability for debts. He can not create a perpetuity by an executory devise after an indefinite failure of issue or at any other future period, which may not be until after a life or lives in being and twenty-one years." The same learned judge, in *Doebler's Appeal*, 64 Pa. St. 9, at page 15, said: "While the intention of the testator, if consistent with law, is undoubtedly to be the polar star, yet we are bound to take as our guides those general rules or canons of interpretation which have been adopted and followed by those who have gone before us. It becomes no man and no court to be wise above that which is written. Security of titles requires that no mere arbitrary discretion should be exercised in conjecturing what words the testator would have used, or what form of disposition he would have adopted had he been truly advised as to the legal effect of the words actually employed. That would be to make a will for him instead of construing that which he has made."

In *Bender v. Fleurie*, 2 Grant, Pa. 345, the testator gave to his daughter certain land in these words: "She shall have it as her own during her life, and then it is to come to the heirs of her body for their own use." This was held to be clearly an estate tail within the rule, and it was said by the court: "But it is said, the testator did not mean to give her an estate tail. Perhaps he did not. But he has used words which in law mean nothing else. If he intended to give but a life-estate *voluit* [*sed*] *non dixit*, we must take what he said, not what he meant. * * * But no court in this State or in England, has ever treated the phrase 'heirs of her body,' as

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words of purchase, when they are used with reference to the issue of a devisee, to whom a life-estate is given. They are words of limitation, and as such they create an estate tail in the first taker, which can not be cut down even by the clearest expressions of a desire, that it shall be a life-estate only."

Preston says: "In wills, the rule applies generally, and without exception, to the several limitations, as often as the gift to the heirs is without any expression of qualification," and in illustration of his meaning, he further says: "Neither the express declaration, *First*. That the ancestor shall have an estate for his life and no longer; nor, *Secondly*. That he shall have only an estate for life in the premises, and that, after his decease, it shall go to his heirs of his body, and, in default of such heirs, vest in the person next in remainder; and that the ancestor shall have no power to defeat the intention of the testator; nor, *Thirdly*. That the ancestor shall be tenant for his life and no longer, and that it shall not be in his power to sell, dispose, or make away with any part of the premises; * * * will change the word heirs into words of purchase." Preston Estates, 365.

In a work declared by the Supreme Court of Pennsylvania, in *Hileman v. Bouslaugh*, 13 Pa. St. 344, to be a "masterly disquisition," it is written: "The requisite limitations to the ancestor and his heirs being found, the rule must be applied. It can never be a question whether the rule shall be applied or not—whether the author of the limitations intended it to be applied or not. We might as well ask whether a testator intended to contravene the rule against perpetuities. It will no more yield to individual intention than any other fundamental law of property. The rule admits of no exceptions." Hays Principles for Expounding Dispositions of Real Estate, 96 (7 Law Library, 52).

The question here under discussion was examined by us in *Shimer v. Mann*, *supra*, and many authorities considered. As a result of that investigation it was declared that "Super-added words, which merely describe or specify the incidents

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of the estate created by such a word of limitation as 'heirs,' do not cut down the interest of the devisee."

Stronger still is the expression of the rule in *Walker v. Vincent*, 19 Pa. St. 369, for it was there said: "The law does not pretend to carry out the intention of the testator in all cases; for many testators show a very clear intention to shackle the estates granted by them to a degree that is totally incompatible with any real enjoyment of them, and which the law does not allow. * * The great merit of the rule in Shelley's case is, that it frustrates and is intended to frustrate unreasonable restrictions upon titles; for when an estate is declared to be a fee simple or fee tail, it is at once made subject to a limitation in its proper form, no matter how clear may be the testator's intention to the contrary."

The words of limitation when used in a will always control. It is as certain as any proposition in jurisprudence, that the words of limitation will bear down all others. There is, therefore, no escape from the force of the rule in Shelley's case, when the word "heirs" is used in its strict legal sense as a word of limitation. But the word "heirs" is not in every case a word of limitation, for it may be employed in a different sense. It has seemed to many that there is a conflict between the rule declaring that the intention of the testator must govern and the rule in Shelley's case; but this appearance of conflict fades away when it is brought clearly to mind that, when the word "heirs" is used as a word of limitation, it is treated as conclusively expressing the intention of the testator. Where it appears that the word was so used, the law inexorably fixes the force and meaning of the instrument. If once it is granted that the word was used in its strict legal sense, nothing can avert the operation of the rule in Shelley's case; so that the inquiry is, was the word used as one of limitation? The only method in which an instrument employing the word "heirs" can be shown not to be within the rule, is by showing that the word was not employed in its strict legal sense. As said in *Hileman v. Bous-*

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laugh, supra, "The question on a will is not whether the testator intended that the rule should not operate, for that is not subject to his power, but whether he used the words 'heirs of the body' as synonymous with the word 'children,' or its proper equivalent." This is essentially the doctrine of our own case of *Shimer v. Mann, supra*. It is because the word "heirs" is not used in its legal sense, that the courts do not apply the rule in Shelley's case, for, where it is so used, the rule must be applied. It was because the word "heirs" was used as meaning "children," that it was held in *Ridgeway v. Lanphear, supra*, and in *Millett v. Ford, ante*, p. 159, that the rule did not operate. Here, however, we must hold that it does operate, because the explanatory or superadded words do not show with that certainty which the law requires, that the word was not used as a word of limitation. *Shimer v. Mann, supra*, and cases cited.

Judgment affirmed.

Howk, J., does not concur in this opinion.

Filed Jan. 13, 1887; petition for a rehearing overruled March 30, 1887.

109	488
125	510

No. 12,682.

THE MIDLAND RAILWAY COMPANY v. SMITH.

ASSESSMENT OF DAMAGES.—*Application by Land-Owner.*—*Railroad.*—*Right of Way.*—*Description.*—*Sufficiency of Application and Writ.*—An application by a land-owner for a writ of assessment of damages under sections 906 and 909, R. S. 1881, for the appropriation of land by a railroad company, must refer to the law authorizing the taking of the property, and both application and writ must contain a precise and particular description of the land sought to be taken.

SAME.—*Insufficient Description.*—*Quashing Writ.*—It is not sufficient to describe the land sought to be taken for a right of way as "about ten rods north of the center" of a certain described eighty-acre tract, and

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that it is "a strip through said land, running east and west at the point aforesaid, about one hundred feet wide," and the writ, on proper motion, should be quashed.

From the Hamilton Circuit Court.

T. J. Kane and *T. P. Davis*, for appellant.

R. R. Stephenson and *W. R. Fertig*, for appellee.

NIBLACK, J.—This was an application by Samuel M. Smith against The Midland Railway Company, under sections 906 and 909, R. S. 1881, for the assessment of damages on account of the survey and location of the company's line of road over the applicant's land.

The application, which was filed in vacation of the court below, averred that the applicant, Smith, was the owner in fee simple of the east half of the northwest quarter of section three (3), in township eighteen (18) north, range three (3) east, in the county of Hamilton, in this State; that said company had surveyed and located its road-bed west through Hamilton county, and that its line of road passed "over and across the plaintiff's said land about ten rods north of the center of said tract, occupying for its right of way a strip through said land, running east and west at the point aforesaid, about one hundred feet wide." Wherefore, after the averment of other pertinent facts, the applicant prayed that a writ for the assessment of his damages, under sections of R. S. 1881 from 881 to 912, both inclusive, might be issued, and such a writ was accordingly issued by the clerk of the court below.

The writ, which recited what purported to be the material part of the application, contained the same description of the strip of land as that embraced in the application as above given.

The sheriff, to whom the writ was issued, after giving notice to the railway company, summoned and empanelled a jury of eight persons, who, after an examination of the premises, assessed the applicant's damages at the aggregate sum

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of \$500, and the sheriff made return of his proceedings to the clerk who issued the writ.

At the ensuing term of the Hamilton Circuit Court, the railway company entered a special appearance to the action, and moved to quash the writ, upon the ground that the writ, as well as the application, did not contain a "precise description" of the strip of land sought to be appropriated by the company, within the meaning of section 906, R. S. 1881, *supra*; also, that the application did not refer to the law which authorized the railway company to take and appropriate the strip of land in question, but the court overruled the motion. Such proceedings were thereupon had as resulted in a confirmation of the assessment of damages made by the jury, and in a judgment in favor of the applicant, Smith.

The policy of the statute, under which this proceeding was instituted, seems to be to require such a "precise description" of the real estate for which an assessment of damages is desired, as will thereafter preclude any difficulty in identifying the land in another action concerning it, or in any other respect when an identification shall become material; also, to require a reference to the law authorizing the taking of such real estate, so that the court may be informed as to the nature and validity of the title which will pass to the person, corporation or company taking it upon the assessment and payment of resulting damages.

These requirements may sometimes inflict greater inconvenience upon the owner of the real estate, who applies for the assessment of the damages, than upon the person, corporation or company which seeks to appropriate some particular part of his real estate for which damages are to be assessed, since such person, corporation or company must usually be presumed to be better informed as to the facts necessary to fulfil such requirements; but, however that may be, the statute seems to require that whoever applies for the assessment of damages under it, must give a precise, and hence particular,

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description of the real estate sought to be taken, and refer to the law which authorizes the taking as proposed.

The phrases "*about* ten rods north of the center of said tract," and "a strip through said land, running east and west at the point aforesaid, *about* one hundred feet wide," are both uncertain and indefinite, the first as to the location of the particular strip of land referred to, and the second as to the area which it contains. Both taken together did not constitute such a "precise description" of the land intended to be described as is contemplated by the statute under which the application in this case was made. There is also nothing expressed to indicate what part of the strip of ground lies *about* ten rods north of the center of the applicant's tract of land, whether its center line or its nearest edge. The motion to quash the writ for the assessment of the applicant's damages ought, therefore, to have been sustained.

In construing the sections of the statute now before us, we have adhered to the construction placed upon those sections by the case of *Indianapolis, etc., R. R. Co. v. Newsom*, 54 Ind. 121. In that case the line of road was described as extending diagonally through the land in question "from a point *near* the northeast corner to a point *near* the southwest corner," and it was held that this description was not sufficiently "precise" within the provisions of section 906 of the statute herein above commented upon.

Pending the motion to quash the writ for the assessment of the damages, the railway company asked and obtained leave to strike out the word "*about*" wherever it occurred in the application for the writ in connection with the description of the strip of land to which reference was therein made, and it was after the word "*about*" was so struck out, in pursuance of the leave thus granted, that the motion to quash was overruled. There was, however, no leave asked to amend, and hence no amendment was made in the description of the strip of land contained in the writ which conferred the authority for the assessment of the damages. Un-

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der such circumstances, the amendment of the application did not cure the defective description in the writ, and did not, in consequence, break the force of the objection urged against the sufficiency of the writ on account of such defective description.

As to the practice governing objections and exceptions to the findings, reports and assessments of specially organized tribunals, see the cases of *Beeber v. Bevan*, 80 Ind. 31; *Roush v. Emerick*, 80 Ind. 551; *Coulter v. Coulter*, 81 Ind. 542. A jury is not required to try such objections or exceptions.

The judgment is reversed, with costs, and the cause is remanded with instructions to grant the appellee further leave to amend if he shall desire such leave, and, in default of further amendment, to sustain the motion to quash the writ for the assessment of the damages.

Filed Dec. 23, 1886; petition for a rehearing overruled Feb. 17, 1887.

No. 13,184

THE SECOND BAPTIST CHURCH (COLORED) v. FURBER
ET AL.

109 492
156 586

MORTGAGE.—*Promissory Note.—Trustee.—Agency.—Church.—Pleading.—*

Where a note and mortgage are executed by several persons, without anything to show that they are acting as trustees or agents, or in any official or representative character, such note and mortgage are the obligations of the several makers; but where it is alleged in a complaint thereon that a church organization, which is made a defendant, being in debt and having an unfinished building, applied to the plaintiff through such persons, as its trustees and agents, for a loan, that the loan was made to and the money received by the church and applied to the payment of its debts and the completion of its building, and that the sum loaned is due and unpaid, a cause of action is stated against the church.

From the Marion Superior Court.

C. E. Clark, for appellant.

E. F. Ritter, L. Ritter and B. W. Ritter, for appellees.

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Howk, J.—This was a suit by appellee Furber to foreclose a mortgage on certain real estate in the city of Indianapolis, alleged to have been executed for and on behalf of appellant by its trustees at the time, and to collect the debt secured thereby. The cause was put at issue and heard by the court, and a finding and decree were made and rendered by the court at special term, in favor of appellee Furber and against appellant, for the foreclosure of such mortgage, and the sale of the mortgaged real estate to pay the amount due on the mortgage debt, and costs accrued and to accrue, etc. On appeal, the general term affirmed the judgment and decree of the court at special term, and from such affirmance this appeal is now here prosecuted.

By proper assignment of error here, appellant, the Second Baptist Church (colored), which alone appeals, has brought before this court the errors it assigned in general term upon the overruling of its demurrers to each of the two paragraphs of appellee Furber's complaint.

In the first paragraph of his complaint, Furber alleged that, on and before the 2d day of May, 1874, the "Second Baptist Church (colored) of Indianapolis, Indiana," appellant, was largely indebted and in need of money to discharge such indebtedness, and to build and finish its church for use and occupation, and it applied to appellee Furber for a loan of \$5,000 for such purposes; that appellant ordered and directed its co-defendants, Huston, Lewis, Steel, Wilson, Pinkton, Pierce, Doyle, and one Moses Broyles, since deceased, who were then and there its trustees and agents, to make such loan for appellant; that, in pursuance of such order and direction, appellant, by and through its trustees and agents, on such 2d day of May, 1874, borrowed of appellee Furber said sum of \$5,000, which sum of money was then and there furnished by him to appellant, and was by it received and used for the purpose of paying its obligations and finishing its church building, as aforesaid; that appellant's trustees above named executed to appellee Furber a

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promissory note for \$5,000, due five years after date, a copy of which note was therewith filed and made part thereof, and also executed ten coupon or interest notes which had since been paid, but that the principal note of \$5,000 was past due and wholly unpaid.

Appellee Furber further alleged that, to secure the payment of said notes, appellant, by a vote of its members duly had, authorized and directed its trustees and agents aforesaid to mortgage to appellee Furber its real estate and church building thereon, in the city of Indianapolis, Marion county, Indiana, described as follows, to wit: (Description omitted); that, in pursuance of such authority and the order and direction of appellant, its said trustees, on the day and year aforesaid, executed to appellee Furber a mortgage upon its said property, a copy of which mortgage was therewith filed and made part thereof; that such mortgage was duly recorded in the proper record of Marion county, within forty-five days from the date of its execution; that in the execution of such mortgage, the trustees aforesaid were acting for and on behalf of appellant, and by its authority and direction; and that, after the execution of said notes and mortgage, appellant recognized and ratified the acts of said trustees in all things done therein, and adopted said mortgage and notes, and paid the interest notes so secured by said mortgage as aforesaid; but, as appellee Furber was informed and believed and averred, appellant failed and neglected to enter of record the vote and direction to make said mortgage and notes; that said mortgage was in truth and in fact, and, by all the parties thereto, was intended to be, the mortgage of said Second Baptist Church, but that, by the mutual mistake and oversight of said parties and of the scrivener, appellant was not named in said mortgage; that prior to the execution of said notes and mortgage, the above named trustees were authorized and empowered by appellant to make said loan, and to execute said mortgage upon its church property aforesaid to secure the same; that appellant received the said money, so

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loaned by appellee Furber, and recognized and adopted the aforesaid acts of its trustees and agents, and ratified and adopted said notes and mortgage as its notes and mortgage, and paid the interest or coupon notes as aforesaid; and that the principal note of \$5,000 remained due and wholly unpaid.

Appellant's trustees and the pastor of the church, at the time this suit was commenced, were also made defendants thereto. There were other allegations of fact in the first paragraph of complaint, but we have given the substance of the facts pleaded for the purpose of showing that the note and mortgage sued upon were the note and mortgage of appellant.

In the second paragraph of his complaint, appellee Furber alleged substantially the same facts as those stated in the first paragraph, except that the averment to the effect that, by the mutual mistake and oversight of the parties and of the scrivener, appellant was not named in the mortgage sued upon, found in the first paragraph, is wholly omitted from the second paragraph of complaint.

It appears from the copies of the note and mortgage in suit, filed with and made parts of each paragraph of complaint, that the Second Baptist Church (colored), appellant, was not named, nor even alluded to in either such note or mortgage, and that the several persons, whose names were subscribed to such note and mortgage, apparently executed the same respectively as individuals, and not as trustees or agents for any one, or in any official or representative character.

Appellant separately demurred to each paragraph of complaint, solely upon the ground that it did not state facts sufficient to constitute a cause of action. These demurrers were overruled by the court, and these rulings are the only errors of which complaint is here made by the appellant.

We are of opinion that the court did not err in overruling appellant's demurrers to each paragraph of appellee Furber's complaint. It is true, no doubt, as appellant's counsel claims, that the note and mortgage, described in each paragraph of

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such complaint, were the note and mortgage of the several makers thereof, and were not, and did not purport to be, upon the face thereof respectively, the note and mortgage of the appellant. This much is settled, and correctly so we think, by the decisions of this court. *Hays v. Crutcher*, 54 Ind. 260; *Hayes v. Matthews*, 63 Ind. 412; *Hayes v. Brubaker*, 65 Ind. 27; *Williams v. Second Nat'l Bank*, 83 Ind. 237; *McClellan v. Robe*, 93 Ind. 298.

If, in the case in hand, appellee Furber had alleged in his complaint merely the execution of the note and mortgage described therein, and that the mortgage debt was due and unpaid, while such complaint would have been amply sufficient to withstand a demurrer on the part of the defendants, who executed such note and mortgage, it is clear that it would have stated no cause of action whatever against the appellant. But in each paragraph of his complaint appellee Furber has stated such facts precedent and subsequent to the execution of the note and mortgage, and connected therewith, as constituted a good cause of action against the appellant, without regard to any liability on its part on such note and mortgage. In each paragraph of complaint, it was alleged that, at and before the 2d day of May, 1874, appellant was involved in debts which it could not pay, and had an unfinished church edifice which it wanted to complete; that, to enable it to pay its debts and finish its church building, appellant, by and through its authorized officers and agents, applied to appellee Furber for a loan of \$5,000; that on the day and year last named, Furber loaned the appellant such sum of \$5,000 upon a credit of five years, and it received the money; that appellant applied such money to the payment of its debts and the completion of its church edifice; and that the sum of money, so loaned appellant by appellee Furber, was long past due and wholly unpaid.

All these facts were fully and clearly stated, in each paragraph of complaint herein, and were amply sufficient, as it seems to us, to constitute a cause of action against the appel-

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lant, good on its demurrer thereto for the want of sufficient facts.

Even if it were conceded, therefore, that each paragraph of the complaint failed to show that appellant was liable on the note and mortgage described therein, a point which we need not and do not decide, still, we think, the court committed no error in overruling its demurrers to each paragraph of complaint. It does not affect the question we are now considering, that each paragraph of complaint sought the foreclosure of the mortgage described therein. If the paragraph stated facts sufficient to constitute a cause of action against the appellant, its demurrer thereto was correctly overruled, no matter what other facts might be alleged, nor what relief might be sought therein. The only question we are required to consider and decide, by the record of this cause and the error assigned thereon, may be thus stated: Does each paragraph of Furber's complaint herein state facts sufficient to constitute a cause of action against the appellant? We are of opinion, for reasons already given, that this question must be answered in the affirmative, and this answer requires us to affirm the judgment below.

The judgment is affirmed, with costs.

Filed Feb. 2, 1887; petition for a rehearing overruled March 8, 1887.

No. 13,229.

THE STATE v. MCKEE.

109	497
148	187

CRIMINAL LAW.—*Appeal from Justice.*—*Presumption of Regularity.*—In the absence of a showing to the contrary, it will be presumed that an appeal from a justice of the peace to the circuit court was regularly taken.

SAME.—*Malicious Trespass.*—*Affidavit.*—It must be charged in an affidavit for malicious trespass, that the property was injured, the amount of the

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damage resulting from the injury, and that the person alleged to have been damaged is the owner of the property.

SAME.—Insufficient Affidavit.—An affidavit, charging that the defendant “did unlawfully and maliciously throw down the fence and pass over the enclosed lands” of the affiant, to his “damage in the sum of five dollars,” is not sufficient.

SAME.—Motion for Leave to File New Affidavit.—Bill of Exceptions.—A motion by the prosecuting attorney for leave to file a new affidavit in lieu of another, and the ruling of the court refusing leave, must be made part of the record by bill of exceptions.

From the Knox Circuit Court.

W. A. Cullop, Prosecuting Attorney, *G. W. Shaw* and *C. B. Kessinger*, for the State.

G. G. Reily and *W. C. Niblack*, for appellee.

ZOLLARS, J.—Appellee was convicted and fined by a justice of the peace, on a charge of malicious trespass. A transcript, purporting to be, and which is treated by counsel as being a transcript of the proceedings in the cause before the justice, was filed by that officer in the office of the clerk of the circuit court, within the time allowed by law for appeals in such cases.

In the circuit court, the State, by its prosecuting attorney, moved to dismiss the appeal. As we learn from the brief in behalf of appellant, that motion was based upon the ground alone, that the transcript of the proceedings in the justice's court does not affirmatively show that appellee prayed an appeal, and filed a recognizance as required by law.

There was no showing in support of the motion, that an appeal had not been, in fact, properly taken, the proper bond filed, and that bond sent up with the transcript and filed in the office of the clerk of the circuit court. If an appeal was in fact taken, the failure of the justice to note that fact in his docket is not a sufficient cause for dismissing the appeal. In the absence of anything to the contrary, we must presume in favor of the jurisdiction of the circuit court, by presuming that the case came into that court by a regular

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appeal. *Unruh v. State, ex rel.*, 105 Ind. 117, and the cases there cited. Upon the record before us, this court can not determine that the court below erred in overruling the motion to dismiss the appeal.

On motion of appellee, the circuit court quashed the affidavit. That ruling is assigned as error. Does the affidavit sufficiently charge a malicious trespass, as that offence is defined by the statute?

Section 1955, R. S. 1881, provides that, "Whoever maliciously or mischievously injures or causes to be injured any property of another or any public property is guilty of malicious trespass, and, upon conviction thereof, shall be fined not more than two-fold the value of the damage done, to which may be added imprisonment in the county jail," etc.

It will be observed, that the fine provided for a violation of the statute, is measured by the amount of the "damage done." It may not be more than double that amount. In order that the court may determine the amount of fine to be imposed, the amount of damage done must be alleged and proved. The damages too must result from an injury to the property, and hence it must be made to appear by the affidavit, information, or indictment, that the property was injured. If no injury is shown, no crime, as defined by the statute, is shown. And if injury to the property be shown, but no amount of damage resulting from that injury, the affidavit, information, or indictment is insufficient, because the court can not measure the fine to be imposed, and hence can not pronounce the judgment provided by the statute. These things must be shown by the affidavit, information, or indictment, that the defendant may be apprised of what he is to meet. *Brown v. State*, 76 Ind. 85; *State v. Cole*, 90 Ind. 112; *Sample v. State*, 104 Ind. 289.

So much of the affidavit as is material here is as follows: "Julia A. Ridgeway being duly sworn says, that on the 3d day of March, in the year 1886, at the county of Knox, and State of Indiana, George McKee, late of said county, did

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then and there unlawfully and maliciously throw down the fence, and pass over the enclosed lands of this affiant, situated in said county and State, to this affiant's damage in the sum of five dollars, contrary," etc.

This affidavit, we think, is too vague and indefinite. It is charged therein, that by the malicious acts of appellee, the prosecuting witness was damaged, but it can not be determined whether that damage resulted from the throwing down of the fence, or the passing over the land. It is not shown that the land was injured. The simple passing over the land of another, however malicious the motive may be, is not malicious trespass.

As we have seen, to constitute malicious trespass, there must be an injury to the property. Passing over the lands of another is not a crime at all, except under the circumstances specified in section 1941, R. S. 1881.

It is not made to appear by the affidavit, that the fence, charged to have been thrown down, was upon the land of the prosecuting witness, nor that she had any ownership or interest therein. The only injury charged in the affidavit is damage to the prosecuting witness. Unless the fence is shown to have belonged to her, it is difficult to see how she could be damaged by its being thrown down.

Wherever, in a case of this character, it may be sufficient to allege damage to the owner, instead of injury to the property, it must appear that the property was injured, and that the damages to the owner resulted directly from such injury. And in order that that may be so, it must also appear that the person alleged to have been damaged was the owner of the property injured.

It is not sufficiently shown here that the fence was of value because it enclosed land, nor that it was otherwise of value. For aught that appears, it may have been so without value, that the throwing of it down was neither an injury to it nor damage to the owner.

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Our conclusion is, that the court below did not err in sustaining the motion to quash the affidavit.

There is copied into the transcript a statement, that after appellee had moved to quash the affidavit, the State, by its prosecuting attorney, moved the court for leave to file an affidavit in lieu of the affidavit above set out, and upon which appellee was convicted; that the court declined to grant such leave, and that the State, by its attorney, excepted. That portion of the record is evidently a transcript of an entry made by the clerk. The entry thus made did not bring into the record, either the motion by the State's attorney, if such a motion was in fact made, or the ruling of the court thereon. The only way in which they could be brought into, and made a part of the record, was by a bill of exceptions. They were not so brought into the record. There is no bill of exceptions in the record.

We can, therefore, decide nothing as to the right of the State to file a new affidavit as proposed.

Judgment affirmed.

Filed Feb. 17, 1887.

No. 8948.

SIMS v. GAY ET AL.

JURISDICTION.—*Presumption.*—Where the record is silent, jurisdiction will be presumed.

EVIDENCE.—*Judgment.*—*Notice.*—*Jurisdiction.*—Where it does not appear that notice was not issued, but it does appear that jurisdiction was assumed and a final judgment rendered, such judgment is competent evidence.

REAL ESTATE, ACTION TO RECOVER.—*Color of Title.*—*Void Judicial Proceeding.*—A judicial proceeding under which possession is taken, although void, will constitute color of title.

SAME.—*Statute of Limitations.*—*Disability.*—*Infancy.*—*Marriage.*—Where the statute of limitations begins to run during infancy, it is not stayed by

109	501
125	115
127	201
127	222
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109	501
124	246
124	522
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165	289

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a marriage during non-age, nor the time for bringing the action extended by the intervention of the latter disability.

ESTOPPEL. — *Deed.* — *Decedents' Estates.* — *Widow.* — *Executor.* — Where a widow, as executrix, appoints an assistant, under a power given in the will, who alone applies for an order to sell real estate, but she joins in the deed, and in reporting it for confirmation, she is estopped from asserting, as against her grantees, that all the land was not sold.

WILL. — *Estate During Widowhood.* — An estate limited to the widowhood of a surviving wife terminates with her second marriage.

From the Marion Superior Court.

H. Dailey, W. N. Pickerill, J. L. McMaster and A. Boice,
for appellant.

R. N. Lamb and S. M. Shepard, for appellees.

ELLIOTT, J. — The questions in this case arise on the ruling denying the appellant a new trial, and it is unnecessary to notice the pleadings further than to say that the complaint is for the recovery of real property.

The trial court, over the objection of the appellant, admitted in evidence the record of the proceedings in the matter of the petition of the executor of the last will of William Nugent to sell the testator's real property to pay debts. We think there was no error in this ruling. It is true, that this record does not show that the appellant, who was a daughter of William Nugent, was notified of the petition, but, as our cases uniformly hold, the presumption is in favor of the jurisdiction of the court, and where the record is silent jurisdiction will be presumed.

In the early case of *Horner v. Doe*, 1 Ind. 130, it was said: "Where the record discloses nothing upon the point, jurisdiction of the person and of the subject-matter, will, the contrary not being proved, be presumed, in cases of domestic judgments of courts of general jurisdiction, where they come collaterally in question." In support of this doctrine many cases are cited, and it has been sanctioned by this court in a great number of cases. *Doe v. Smith*, 1 Ind. 451, p. 459; *Doe v. Harvey*, 3 Ind. 104; *Alexander v. Frary*, 9 Ind. 481;

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Waltz v. Borroway, 25 Ind. 380; *Dequindre v. Williams*, 31 Ind. 444; *Hays v. Ford*, 55 Ind. 52; *Dwiggins v. Cook*, 71 Ind. 579; *State, ex rel., v. Ennis*, 74 Ind. 17; *Iles v. Watson*, 76 Ind. 359, 361; *Crane v. Kimmer*, 77 Ind. 215, p. 219.

But there are other rules which apply here. One of these is thus stated: "Where a court of general jurisdiction assumes jurisdiction, the existence of all facts necessary to confer jurisdiction are presumed to exist. *Jackson v. State, etc.*, 104 Ind. 516, and cases cited. Another case thus states the rule: "Where the record does not show the contrary, nor what notice was given, it will be presumed that the proper notice was given." *Albertson v. State, ex rel.*, 95 Ind. 370. In the case of *Exchange Bank v. Ault*, 102 Ind. 322, it was said: "In considering such questions, every presumption is indulged in favor of the validity of the judgment or decree sought to be impeached." Many cases sustain this general doctrine. *Pickering v. State, etc.*, 106 Ind. 228, *vide* authorities cited p. 230; *Cassady v. Miller*, 106 Ind. 69. The court having general probate jurisdiction is a court of superior jurisdiction, so that the case is fully within the rule. *Doe v. Smith*, 1 Ind. 451; *Powell v. North*, 3 Ind. 392.

Another rule which applies here is this: Where a court has authority to determine the facts essential to its jurisdiction, its decision that it has jurisdiction can not be collaterally impeached. *Evansville, etc., R. R. Co. v. City of Evansville*, 15 Ind. 395; *Dequindre v. Williams, supra*; *Jackson v. State, etc., supra*, and cases cited; *Pickering v. State, etc., supra*, p. 231; *Spencer v. McGonagle*, 107 Ind. 410.

In this case the record does not show that notice was not issued and served, and it does appear that the court assumed jurisdiction and entered a final judgment, and this is a decision of jurisdictional questions, for it is well settled that it is not necessary to enter a formal order asserting jurisdictional authority. *Platter v. Board, etc.*, 103 Ind. 360, and cases cited; *Carr v. State, etc.*, 103 Ind. 548; *Jackson v. State, etc., supra, vide* p. 520.

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Tested by these rules, it would seem that the record was not only competent evidence, but that it was evidence conclusive in its character. It is, however, not necessary for us to decide at this point that it was conclusive, for it is sufficient to decide that it was competent, and this it clearly was, because, if it did not do much more, it at least proved color of title. It is well settled that where there is a judicial proceeding, although void, under which possession is taken, it will constitute color of title. *Wright v. Kleyla*, 104 Ind. 223; *Brenner v. Quick*, 88 Ind. 546, p. 552; *Bauman v. Grubbs*, 26 Ind. 419; *Doe v. Hearick*, 14 Ind. 242; *Vancleave v. Miliken*, 13 Ind. 105; *Bell v. Longworth*, 6 Ind. 273.

The proceedings for the sale of the land in controversy were begun in October, 1825, and in October, 1826, the deed executed pursuant to the order of the court was confirmed. The appellant's right of action, therefore, accrued in 1826, and as the appellees' grantor had, at least, color of title, the statute of limitations will run unless there is some bar. The only hindrance to the running of the statute was the infancy of the appellant, but that disability was removed more than forty years before the action was brought. When that disability was removed, she had a right to bring her action within the statutory period, and having failed to do so she is barred. It is a mistake to suppose that the statute does not begin to run during the existence of the disability, for it does begin to run, whether a disability exists or not; but, where there is an existing disability, a period of two years after its removal in which to sue is allowed by our statute. *Wright v. Kleyla*, *supra*; *Barnett v. Harshbarger*, 105 Ind. 410; *Wright v. Wright*, 97 Ind. 444; *White v. Clawson*, 79 Ind. 188.

The appellant, it is true, married during non-age, but this does not affect the question, because one disability can not be tacked to another. When the statute once begins to run nothing stays its course. *Knippenberg v. Morris*, 80 Ind. 540; *White v. Clawson*, *supra*; *Kistler v. Hereth*, 75 Ind. 177;

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Wood Limitations, p. 491, section 251; Angell Limitations (6th ed.), section 197.

The will of William Nugent authorized his widow to appoint an assistant to aid her in the discharge of the duties of the trust of executing the will; she did appoint an assistant, and he, as it appears, applied for an order to sell the land, but she joined him in reporting the deed for confirmation, and also joined in the deed. This is sufficient to estop her from asserting, as against her grantees, that all of the land was not sold. *Pepper v. Zahnsinger*, 94 Ind. 88; *Pitcher v. Dove*, 99 Ind. 175.

If, however, we are wrong in holding that the appellant's mother parted with her title in 1826, still the action is barred by the statute, for the will limited the mother's estate to the period of her widowhood, and that period expired when she married her second husband in 1829. It is settled law that an estate limited to the widowhood of a surviving wife terminates with her second marriage. *Harmon v. Brown*, 58 Ind. 207; *Wood v. Beasley*, 107 Ind. 37.

It would seem from the authorities, as well as upon principle, that the case is within section 210, R. S. 1852, p. 75, but we do not deem it necessary to decide this question. *White v. Clawson*, *supra*; *Wright v. Wright*, *supra*; *Souders v. Jeffries*, 107 Ind. 552; *Gray v. Stiver*, 24 Ind. 174; *Vail v. Halton*, 14 Ind. 344.

It is quite clear, on the whole record, that the judgment below is right.

Judgment affirmed.

Filed Nov. 19, 1886; petition for a rehearing overruled March 15, 1887.

Summit v. Yount *et al.*

No. 12,823.

SUMMIT v. YOUNT ET AL.

WILL.—Devise of Estate During Widowhood.—Restraint of Marriage.—Words of Limitation and Condition.—A devise of property to a wife “so long as she remains my widow” is a limitation of the estate merely, and not a condition in restraint of marriage within the meaning of section 2567, R. S. 1881, and upon a second marriage the estate terminates.

From the Morgan Circuit Court.

G. A. Adams and J. S. Newby, for appellant.

G. W. Grubbs and M. H. Parks, for appellees.

Howk, J.—This was a suit by the appellees against appellant, in a complaint of two paragraphs. The first paragraph was a complaint, in the statutory form, for the recovery of certain real estate, particularly described, in Morgan county. In the second paragraph of their complaint, appellees sought to quiet their title to the same real estate against the adverse claims of the appellant herein. The cause was put at issue and tried by the court, and a finding was made for appellees, the plaintiffs below; and over appellant's motion for a new trial, the court rendered a judgment and decree in favor of appellees, upon and in accordance with its finding herein.

Appellant has here assigned a number of errors; but it has seemed to us, from our examination of the record herein, that the merits of the cause are presented for our decision, as fairly for appellant as for appellees, by the alleged error of the trial court, in overruling appellant's motion for a new trial. We shall, therefore, consider and decide the questions as to the titles of the parties respectively to the real estate in controversy, upon the case made by the evidence appearing in the record.

Both the appellees and appellant claim to be the owners in fee simple of the real estate, described in the complaint, under one John Radcliff who died testate, on the 25th day of January, 1879, seized in fee simple of such real estate, leaving no child or the descendants of children, and no father or

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mother, but leaving brothers and sisters, and leaving also appellant, Sarah Summit, then Sarah Radcliff, as his widow, surviving him. At the time of his death, John Radcliff was also the owner in fee simple, in his own right, of one hundred and fifty acres of other land, and upon the final settlement of his estate, under his will, his executor paid over to appellant herein, as his widow, the surplus of his personal estate, amounting to the sum of \$3,998. By his last will and testament, which was dated on December, 9th, 1871, and was duly admitted to probate by and before the clerk of the court below on the 10th day of February, 1879, John Radcliff devised and bequeathed his estate, real and personal, as follows :

“1st. I will and bequeath to my wife, Sarah Radcliff, all my estate, both real and personal, so long as she remains my widow. But, in case of her again marrying, I will to her one-third of all my effects, to hold as her own and for her sole benefit as she may desire; and, in case of said subsequent marriage of my said wife, I devise and will to Catharine Yount and Nancy Teeters, daughters of Henry Teeters, jointly and equally, the tract of land belonging to me, and lying south of the farm now owned by William Radford, supposed to contain seventy-four acres, for their sole use and benefit; and the balance of my estate, in case of said subsequent marriage, to be equally divided between my brothers and sisters. I also desire and appoint Lemuel Guthridge executor of this my last will. Done, this,” etc.

Appellant, the widow of John Radcliff, deceased, and named in such decedent's will as his wife, and Lawson Summit were married on the 10th day of May, 1885. The appellees are the devisees named in such decedent's will as Catharine Yount and Nancy Teeters, and are grandchildren of the testator's first wife. The seventy-four acres of land devised to appellees by the testator, in case of the subsequent marriage of his wife, the appellant herein, is the same real estate described in the complaint in this action. After the

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marriage of appellant and Lawson Summit, to wit, on May 20th, 1885, appellees served a written notice on appellant requiring her to yield and surrender to them, as the rightful owners thereof, the immediate possession of the real estate in controversy herein; and such notice not having been complied with, appellees commenced this action against appellant in the court below, on the 5th day of August, 1885.

We have now stated the facts of this case, in regard to which there is no conflict in the evidence; indeed, we may say there is no conflict whatever in regard to any of the material facts, and these we have fully stated. The proper decision of this case, it is manifest, depends upon the construction which must be given to the first sentence in the last will of John Radcliff, deceased, namely: "I will and bequeath to my wife, Sarah Radcliff, all my estate both real and personal, so long as she remains my widow." The controversy between the parties, appellant and appellees, mainly turns upon the last few words of the sentence last quoted,— "so long as she remains my widow,"—appellant's counsel vigorously insisting that these words make the testator's devise of all his estate, both real and personal, to depend upon a "condition in restraint of marriage," while appellee's counsel earnestly contend that such words simply "mark the period which is to determine the estate" devised to the appellant.

Our statute provides that "A devise or bequest to a wife, with a condition in restraint of marriage, shall stand, but the condition shall be void." Section 2567, R. S. 1881, in force since May 6th, 1853. In 4 Kent Com. 126, Chancellor Kent defines the distinction between words of limitation and words of condition, as follows: "Words of limitation mark the period which is to determine the estate; but words of condition render the estate liable to be defeated in the intermediate time, if the event expressed in the condition arises before the determination of the estate, or completion of the period described by the limitation. The one specifies

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the utmost time of continuance, and the other marks some event, which, if it takes place in the course of that time, will defeat the estate."

This statement of the distinction between words of limitation and words of condition, of itself, settles the point of contention under consideration adversely to the views and argument of appellant's counsel, in the case now before us. The words, "so long as she remains my widow," are in the strictest sense words of limitation, and not of condition. Clearly and unequivocally, these words specify the widowhood of appellant as the utmost time of continuance of the estate devised to her; and they do not mark or indicate any event, the occurrence of which, in the intermediate time, will defeat such estate. The terms of the testator's devise to his wife, the appellant, are not distinguishable in legal effect from those of the first devise, copied in the opinion of the court, in *Harmon v. Brown*, 58 Ind. 207, as follows:

"First, I give and bequeath unto my beloved wife, Penina, during her widowhood, all my real and personal estate, to be held and freely possessed and enjoyed during her widowhood."

There, as here, the testator's widow terminated her widowhood by her subsequent marriage; and there, as here, the question was presented for our decision, whether the words "during her widowhood" (which do not differ in meaning from the words "so long as she remains my widow") were words of limitation, or words of condition. In the case cited it was held, upon full consideration, that the words "during her widowhood" were words of limitation, and not of condition within the meaning of section 2567, *supra*. The court there said: "A man may devise property to his widow during her widowhood. He is not obliged to devise to her a larger estate, as for life or in fee, in order to accomplish that purpose. But if he desires to devise a larger estate, as for life or in fee, and so expresses himself in his will, but makes it dependent upon the condition that she should not

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marry, the condition will be regarded as *in terrorem* and void. Such condition will not cut down an estate to a period less than that to which it is limited." To the same effect, substantially, are the following more recent cases: *Coon v. Bean*, 69 Ind. 474; *Stilwell v. Knapper*, 69 Ind. 558 (35 Am. R. 240); *Brown v. Harmon*, 73 Ind. 412; *Tate v. McLain*, 74 Ind. 493; *O'Harrow v. Whitney*, 85 Ind. 140; *Hibbits v. Jack*, 97 Ind. 570 (49 Am. R. 478), and authorities cited.

Much stress is placed, on behalf of appellant, upon her right to elect under the provisions of section 2491, R. S. 1881, in force since May 6th, 1853, to take under the will instead of under the provisions of our statute regulating descents, for a surviving wife. Whether appellant had, or had not, exercised this right of election, or had, or had not, elected to take under the testator's will, or under the provisions of our statute of descents, is one of the disputed questions in this case, which has given rise to considerable discussion by the learned counsel of the respective parties. We are of opinion, however, that as applied to the case in hand, and as against the testator's will, this disputed question is immaterial, or, at least, of no practical importance. For the estate first devised to appellant, so long as she should remain the widow of the testator, having been determined by her subsequent marriage, the remaining devises, which were made to depend upon the condition of such marriage, at once took effect and became operative. Appellant having married again could not, as against the appellees and the other devisees named in the testator's will, claim any greater share or interest in the real estate of the testator than the one-third part thereof; and this share or interest, and no more, she would be entitled to claim and hold, whether she elected to take under the testator's will, or under the provisions of our statute of descents, for a surviving wife.

It is claimed, also, on behalf of appellant, that after the determination of the estate first devised to her, by her subsequent marriage, there was no effective devise over of the

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testator's property mentioned in his will. In this view of the case, appellant's counsel wholly misapprehend, we think, the force and effect of the language used in the will. In plain words, the testator devises to his wife, the appellant, in the event of her again marrying, the one-third of all his estate, and to the appellees the real estate in controversy in this action; and the balance of his estate, he devises to his brothers and sisters in equal shares. The intention of the testator is manifest, and is not unlawful; and, under the accepted rule in the courts of this State, for testamentary construction and interpretation, his intention should be given effect. *Millett v. Ford*, ante, p. 159, and cases cited.

We have found no error in the record of this cause.

The judgment is affirmed, with costs.

Filed Dec. 21, 1886; petition for a rehearing overruled Feb. 16, 1887.

No. 12,577.

**HILL ET AL. v. THE CINCINNATI, WABASH AND MICHIGAN
RAILWAY COMPANY.**

RAILROAD.—Obstruction of Water-Flow.—Liability to Land-Owner.—A railroad company is not liable to a land-owner for injuries caused by the accumulation of surface-water on his premises, by reason of the construction of embankments on its right of way.

From the Grant Circuit Court.

J. A. Kersey and *L. D. Baldwin*, for appellants.

C. E. Cowgill, for appellee.

NIBLACK, J.—Action by Joseph W. Hill and Zimri S. Richardson against the Cincinnati, Wabash and Michigan Railway Company, for obstructing the flow of water from their lands.

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109	511
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The complaint averred that the plaintiffs were the owners of a tract of land in Grant county; that more than thirty years before the commencement of this suit, the falling rains and melting snow had formed a natural channel upon said tract of land, through which the accumulating water had been accustomed to flow; that the railway company, by the erection and continuance of an embankment, had caused such flow of water to be obstructed at three distinct points, from which serious damage had resulted to the plaintiffs.

A trial resulted in a verdict for the defendant, with answers to special interrogatories, to the effect following:

First. That the surface of ground through which the waters resulting from rain and snow found their way out, at the first point at which it was claimed that the railway company had obstructed the flow, was about fifteen acres.

Second. That the surface of ground at the second point, from which it was claimed the flow of water had been obstructed, amounted to about seven acres.

Third. That the surface of ground drained at the third alleged point of obstruction amounted to about eleven acres.

Fourth. That, except at the points named, there was no other place for the waters accumulating on said tract of land to escape.

Fifth. That the water turned back upon the lands of the plaintiffs was mere surface-water, resulting from rains and snows falling upon adjacent lands, shedding towards the railway track at the three points named.

A motion for a new trial being first refused, judgment was given upon the verdict.

Although various questions were reserved during the progress of the proceedings below, the only question made in argument here is upon the alleged error of the circuit court in its instructions to the jury.

The circuit court told the jury, amongst other things, that a watercourse is a stream of water ordinarily flowing in a certain direction, through a defined channel, with bed and

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banks, and that there is a broad distinction between a stream of water and those occasional outbursts of water which, in times of freshets, fill up the marshy places, and run over and inundate adjoining lands; that a watercourse need not be shown to flow continuously; that its channel may sometimes be dry, but there must always be substantial indications of a stream which is ordinarily and most frequently a moving body of water; also, that a channel made by mere surface water, resulting from rains and snows, is not a watercourse, unless there is ordinarily and most frequently a moving body of water flowing through it; that falling rain and melting snow constitute surface water which the owner of land upon which it accumulates may turn into a natural watercourse through his own land, or which he may, by proper legal proceedings, have carried off through the adjoining lands of others; that if it should be found that there was a natural watercourse at all, or any one, of the places at which it was charged that obstructions had been erected, and that the railway company caused such natural watercourse to be obstructed by the erection and continuance of its embankment, to the injury of the plaintiffs, they were entitled to recover; but that if it should be found that there was no such watercourse at any of the places named, then the verdict should be for the defendant.

Counsel for the appellants make no specific objection to any particular part of the instructions given, of which the above is regarded as embracing the most material portions, but contend, in general terms, that the distinction sought to be made between streams of water flowing presumably out of the ground, and channels cut by mere surface water, which have been used for a long period of time to carry off such water, when it accumulates, is not well sustained by the authorities, and that, hence, in that respect, the instructions were erroneous, citing authorities on the subject of easements and the right of way over the lands of adjoining proprietors.

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But upon a careful review of the instructions they appear to us to be correct as abstract legal propositions, and, therefore, in accord with the weight of authority upon the matters to which they relate.

There was, also, evidence given at the trial to which the instructions as given were applicable. We have, consequently, no reason for inferring that the jury were, in any manner, misled by the instructions given them at the trial. *Taylor v. Fickas*, 64 Ind. 167 (31 Am. R. 114); *Schlichter v. Phillipy*, 67 Ind. 201; *Templeton v. Voshloe*, 72 Ind. 134 (37 Am. R. 150); *Cairo, etc., R. R. Co. v. Stevens*, 73 Ind. 278 (38 Am. R. 139); *Benthall v. Seifert*, 77 Ind. 302; *Chambers v. Kyle*, 87 Ind. 83; *Rice v. City of Evansville*, 108 Ind. 7.

The judgment is affirmed, with costs.

Filed Feb. 16, 1887.

 No. 12,096.

FISHER ET AL. v. SYFERS ET AL.

CHATTEL MORTGAGE.—Partnership.—Fraud.—Debtor and Creditor.—Voluntary Assignment.—A chattel mortgage given by a new firm to secure a *bona fide* indebtedness of the old partnership, or of an individual member of the latter, is not therefore fraudulent as against creditors of the new firm, nor does the fact that an assignment for the benefit of creditors is subsequently made, affect its validity.

SAME.—Mortgage of Merchandise.—Renewals of Stock.—A stipulation in a chattel mortgage covering a stock of merchandise, that additions and renewals of the stock shall be deemed to be covered by the mortgage, will not vest title thereto in the mortgagee unless followed by possession by the latter before the rights of others attach, but it does not render the mortgage invalid on its face.

SAME.—Possession by Mortgagor.—Power to Sell.—A fraudulent intent can not be judicially inferred from the fact that the mortgagor, by the terms of the mortgage, may remain in possession, with leave to sell, even though he be not required by a stipulation in the mortgage to account for the proceeds of the sales.

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109	514
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109	514
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109	514
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109	514
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151	431
152	457

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SAME.—Pleading.—Allegations of Fraud.—A general averment of fraud, without more, is not sufficient to defeat a chattel mortgage. Whether it is fraudulent or not is a question of fact to be determined according to the circumstances of each case.

From the Parke Circuit Court.

D. H. Maxwell, F. M. Howard and J. R. Courtney, for appellants.

S. D. Puett, H. E. Hadley, J. L. Griffiths and A. F. Potts, for appellees.

MITCHELL, J.—Syfers, McBride & Co. brought this action against the appellants to set aside certain chattel mortgages, executed by Charles E. and Elizabeth A. Fisher, doing business under the name of Fisher Bros.

The complaint alleges that Fisher Bros. had become indebted to the plaintiffs for goods, wares and merchandise, sold to them by the plaintiffs, and that for the purpose of defrauding their creditors, the defendants Charles E. and Elizabeth A. Fisher executed certain mortgages, covering their stock, to Daniel D. Fisher and Margaret E. Fisher, who are alleged to be relatives of the mortgagors.

It is charged that the mortgage to Daniel D. Fisher was given to secure a note executed by one O. P. Fisher, formerly a member of the firm of Fisher Bros., and also to indemnify the mortgagee against liability on account of his having become surety for the old firm of Fisher Bros., on a note to the Rockville National Bank. It is also charged, that the mortgage executed to Margaret E. Fisher was given as a security for an individual debt due from Charles E. to Margaret E. Fisher. The complaint charges that none of the debts secured by the several mortgages were the debts of the new firm of Fisher Bros., which was, as before stated, composed of Charles E. and Elizabeth A., to which firm the plaintiffs gave credit, but that they were either the debts of the old firm of Fisher Bros., which was composed of Charles E. and O. P. Fisher, or the debts of the individual members of the old firm.

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The complaint charges further, that since the execution of the several chattel mortgages complained of, the new firm has made an assignment for the benefit of its creditors; that the assignee is threatening to sell the partnership property and pay off the mortgages, in fraud of the rights of the creditors of the new firm.

The assignee and mortgagees were joined with the members of the new firm as parties defendants.

One of the errors assigned and presented by one of the appellants is, that the court erred in overruling the demurrer to the complaint.

The theory upon which the complaint, as well as the appellees' argument in support of it, proceeds is, that the chattel mortgages having been given by what is called the new firm of Fisher Bros., to secure in part the indebtedness of the old firm, and in part the debts of individual members of the old firm, such mortgages were in law fraudulent as respects the creditors of the new firm.

The appellants suggest that the complaint was held good below, upon the theory that the mortgages therein described were *per se* fraudulent, because of a recital contained in each, to the effect that the mortgagors might remain in possession of the goods mortgaged, and continue the business, without also requiring that the proceeds of sales be applied to the liquidation of the mortgage debt.

The complaint can not be maintained upon either of the theories suggested. The rule that obtains in the distribution of the estates of partners, and under which partnership creditors are entitled to priority of payment out of the partnership assets, is an equitable doctrine for the benefit and protection of the partners respectively. "Partnership creditors have no lien upon partnership property; their right to priority of payment out of the firm assets, over the individual creditors, is always worked out through the liens of the partners." *Warren v. Farmer*, 100 Ind. 593. *Trentman v. Swartzell*, 85 Ind. 443.

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Upon the death of one partner, or where the firm becomes bankrupt, or where the partnership assets are being administered by a court, the rule of equitable distribution is applicable to its fullest extent. Where, however, the partners have the possession and control of their own property, they have the right to make any honest disposition of it they see fit; each has the right to waive his equitable lien, and together they may sell, assign or mortgage the property of the firm, to pay or secure either an individual debt of one of the partners, or the debts of the firm.

Where debts are fairly owing by either partner individually, the mere preference of individual over partnership creditors by the execution of a chattel mortgage, in the firm name, or by authority of the partners, upon the property of the firm, is not of itself such a fraud upon the partnership creditors as will authorize the setting aside of the chattel mortgage at the suit of a creditor. *National Bank, etc., v. Sprague*, 20 N. J. Eq. 13; *Kirby v. Schoonmaker*, 3 Barb. Ch. 46; *Kennedy v. National Union Bank*, 23 Hun, 494; *In re Kahley*, 2 Biss. 383; Jones Chat. Mort., section 44.

Where a sale or pledge of partnership property is fraudulent in fact, so as to invoke the jurisdiction of the court on behalf of creditors to set it aside, the equitable rule of distribution will be applied. *Hardy v. Mitchell*, 67 Ind. 485.

It is not charged in the complaint, that the debts which the chattel mortgages were given to secure were not fairly owing to the mortgagees.

The mere fact that one of the mortgages was given to the father-in-law of one of the partners, and one to the wife of the other, is no impeachment of their validity. Nor do the general averments, that the mortgages were fraudulently given, with intent to hinder and delay the creditors of the mortgagors, count for anything, in the absence of the statement of any facts which go to impeach the consideration of the mortgages, or which raise an inference of fraud, admitting that the consideration was fair.

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Partners, the same as others, may, by a sale or mortgage of the partnership property, give a preference to their creditors. If a sale or mortgage is made in good faith, to secure a *bona fide* debt or debts, the transaction can not be successfully assailed, on the ground that the creditors preferred are the individual creditors of the several partners. That the partners subsequently made an assignment of all their property for the benefit of all their creditors, does not affect the validity of the mortgages. *Grubbs v. Morris*, 103 Ind. 166, and cases cited; *Henderson v. Pierce*, 108 Ind. 462.

The mortgagees having acquired a right to the property by force of their chattel mortgages, their rights can not be displaced without showing actual fraud. *Louden v. Ball*, 93 Ind. 232.

The chattel mortgages, which are in the usual form, after describing the stock of goods, contain, among others, substantially the following stipulation: That the mortgagors should retain possession of the stock, and operate the business, keeping the stock replenished from time to time, so as to keep the quantity and variety substantially intact, with the view and purpose to aid in the payment and discharge of the notes secured. The after-acquired stock was to be considered as coming under the terms of the mortgages.

The stipulation that additions and renewals to the stock that might thereafter be made should be deemed to be covered by the mortgage was ineffectual, without more, to vest in the mortgagee a title to such after-acquired property. Such a stipulation followed by possession of the mortgagee, before the rights of others attach, has been held effectual to vest the latter with both a legal and equitable right to after-acquired property. *Jones Chat. Mort.*, section 405.

The stipulation did not, however, render the mortgage invalid on its face. Nor does the right of the mortgagors to continue in possession with power to continue the business and dispose of the stock at retail, make the mortgages fraudulent *per se*.

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Under the more recent decisions of this court, based upon a construction of section 4924, R. S. 1881, a fraudulent intent can not be judicially inferred from the fact that the mortgagor, by the terms of the mortgage, may remain in possession with leave to sell the property, even though he be not, by stipulation in the mortgage, required to account for the proceeds of such sales. Whether the mortgage was or was not actually fraudulent, is a question of fact to be determined according to the circumstances of each particular case. *McFadden v. Fritz*, 90 Ind. 590, and cases cited; *Desar v. Field*, 99 Ind. 548; *Jones Chat. Mort.*, section 387.

For the error in overruling the demurrer to the complaint the judgment is reversed, with costs.

Filed Feb. 16, 1887.

No. 12,578.

GREEN v. GROVES ET AL.

CONTRACT.—Specific Performance.—Sale of Real Estate.—Statute of Frauds.—Husband and Wife.—Release of Inchoate Interest.—Mortgage.—Debtor and Creditor.—A verbal agreement by a creditor with the wife of his debtor, that in consideration that she shall join her husband in a mortgage of real estate belonging to the latter, thus releasing her inchoate interest, he will, upon acquiring title through foreclosure and sale, convey to her a certain part of the property, is a parol contract for the sale of land within the meaning of the statute of frauds, and if the mortgagee refuses to convey, specific performance can not be enforced.

SAME.—Part Performance.—Payment of Consideration.—Continuation of Precedent Possession.—Neither the continuation of a precedent possession, nor the payment of the consideration, in whatever form, is such part performance of a parol contract for the sale of land as will take it out of the statute of frauds.

SAME.—Refusal to Perform Contract to Convey.—Fraud.—A refusal to fulfil a contract to convey is a moral wrong, but is not, in itself, such fraud as will justify a decree for a specific performance notwithstanding the statute of frauds.

. From the Hendricks Circuit Court.

109	519
126	380
109	519
131	291
133	344
109	519
145	306
109	519
148	641

Green v. Groves *et al.*

L. M. Campbell and H. E. Smith, for appellant.

J. S. Duncan, C. W. Smith, J. R. Wilson, T. L. Sullivan and A. Q. Jones, for appellees.

ZOLLARS, J.—The facts stated in appellant's complaint, so far as they are essential here, are as follows: In 1876, appellant's husband, Morton D. Green, was the owner in fee of a tract of land, and also three lots in Brownsburg. At that time he was indebted to his kinsman and close friend, Morton W. Groves, in the sum of \$2,000, which debt was evidenced by a promissory note.

He was also indebted to other persons; his whole indebtedness being more than he was able to pay. In November of that year, Groves, desiring to have his debt secured and thus acquire a preference over other creditors, applied to appellant and her husband, and requested them to give him a mortgage upon the real estate above mentioned to secure his debt, being all the real estate that Green owned. At the time he made this request, he promised appellant, that if she would join in the mortgage with her husband, he, Groves, in the event he was required to foreclose the mortgage, and if he should purchase the real estate at the sheriff's sale, would, after getting a sheriff's deed, upon demand, convey to her, appellant, the said lots. As a further inducement to her to join in the execution of the mortgage, Groves represented to her that she would, by the method proposed, become invested with the title to a portion of the real estate equal to one-third of the whole, at less trouble and expense than she could by any other means; that the expense of the execution of the mortgage and the foreclosure of the same would be no greater by reason of her joining in the execution, and that, finally, being the owner of the real estate by a sheriff's sale and deed, the cost of executing a deed to appellant for the lots would be the only expense incurred; and that if she should not so join in the mortgage, in order to get her one-third interest in the land set apart, it would be necessary to

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incur the expense of a partition suit. Having full confidence in the integrity of Groves, and in his promise, and relying thereon, appellant joined with her husband in the mortgages that covered the land and lots above mentioned.

At that time, and ever since, appellant was, and has been, in the actual possession of the lots.

In May, 1878, Groves instituted a suit for the foreclosure of the mortgages. At the time he commenced the suit, and at the time the summons was served upon appellant, he again promised and agreed with her, that if she would allow a decree of foreclosure to be made upon default, he would in good faith, and for her use, benefit and protection, carry out his original promise, to convey to her by deed the said lots.

Relying again upon his promise, she made default; the mortgage was foreclosed, and a decree for the sale of the real estate was rendered. In August, 1878, the real estate was sold under the decree, and Groves purchased it upon a bid of \$2,100, being the full amount of his debt, with costs.

At the time of the sale the land was worth \$2,500 and the lots \$800. At the expiration of a year after the sale, Groves received a sheriff's deed, and within a very short time thereafter, and before having an opportunity to make the conveyance of the lots as agreed upon, he died intestate, leaving appellees herein as his minor children and heirs at law.

Thus, the heirs of Groves hold the real estate, of the value of over \$3,000, for a debt of appellant's husband of \$2,000 originally, and she has nothing. The prayer of the complaint is for a decree for a specific performance of the contract between her and Groves, for the appointment of a commissioner to convey the said lots to her, and that her title thereto be quieted as against any claims by appellees. "And she prays for general relief in the premises."

A demurrer was sustained to the complaint, and a judgment for costs was rendered against appellant.

From that judgment she appealed, and assigns as error here the ruling of the court in sustaining the demurrer. The case

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as made by the complaint is clearly not for a rescission of the contract between appellant and Groves, and the recovery of what she conveyed to him, nor for money damages. This is manifest from several considerations. In the first place, she released her right in the land and the lots; the complaint has reference to the lots alone.

The complaint does not treat the contract between appellant and Groves as void or voidable, but, on the contrary, is constructed upon the theory that it is valid and enforceable, and may and ought to be specifically enforced. The prayer is not that appellant may have restored to her what she parted with by her deed to Groves; not that the one-third of the lots and land may be set off to her; nor that she may recover money damages, by reason of his bad faith in the non-fulfilment of the contract, but that the contract may be enforced according to its terms.

In short, the action is upon the contract. The prayer "for general relief in the premises" must be held to have relation to the lots. The theory of the complaint, as we have said, is, that appellant is entitled to recover the lots. If, upon that theory, it is insufficient, the demurrer thereto was properly sustained. *Cottrell v. Aetna Life Ins. Co.*, 97 Ind. 311; *Western Union Tel. Co. v. Reed*, 96 Ind. 195 (198); *First Nat'l Bank v. Root*, 107 Ind. 224.

In the second place, the action can not be said to be for money damages, because the proper parties are not shown to be before the court. Under exceptional circumstances, cases may be maintained against the heirs, which are ordinarily to be prosecuted against the administrator. This is not shown to be such a case. For aught that appears, there may be an administrator of Groves' estate, or, if not, one ought to be appointed. See *Schneider v. Piessner*, 54 Ind. 524; *Bearss v. Montgomery*, 46 Ind. 544; *Walpole v. Bishop*, 31 Ind. 156. Does the complaint, then, make a case for a specific performance of the contract to convey the lots to appellant?

There being no averment that the contract between appel-

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lant and Groves was in writing, it must be assumed that it rested in parol. *Langford v. Freeman*, 60 Ind. 46; *Carlisle v. Brennan*, 67 Ind. 12.

The statute of frauds and perjuries, section 4904, R. S. 1881, provides that no action shall be brought upon any contract for the sale of lands, unless the promise, contract, or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized.

The contract set out in the complaint is clearly within the statute of frauds. Within the sense, spirit and purpose of that statute, it is a contract for the sale of land. At the time the contract was made, appellant's husband owned the land and lots. Had she not signed the mortgage, upon its foreclosure and a sale of the land and lots under the decree, she would have become the owner in fee of the undivided one-third thereof, under the statute of 1875. Until such sale, she had but an inchoate interest in the lands and lots. The release of that inchoate interest, however, was a sufficient consideration for the promise by Groves. *Jarboe v. Severin*, 85 Ind. 496, and cases there cited.

The release of that inchoate interest in the land is the alleged consideration for the agreement on the part of Groves to acquire title to the lots and convey them to appellant. In short, the substance of the agreement is, in the sense of the statute of frauds, that Groves should sell the lots to appellant—should convey the title thereto to her, and thus make her what she was not before, the owner of them.

The agreement was not for an exchange of lands, as contended by appellant's counsel, because appellant did not own any of the land. And if it had been, it would have been no less within the statute of frauds.

Mr. Waterman, in his work on Specific Performance of Contracts, at section 279, says: "There is no difference between a parol sale and a parol exchange of lands, in regard

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to the requisites to take it out of the statute of frauds." That doctrine has been fully recognized and sanctioned by this court. Indeed, the precise question presented by the complaint here has been adjudicated against appellant in the case of *Carlisle v. Brennan, supra*. In that case, the wife joined her husband in the execution of a mortgage to secure the husband's debt, with the verbal agreement between her and the mortgagee, that he should foreclose the mortgage, and thereby perfect the title to the real estate in himself, and, upon payment of the debt by the wife, convey the real estate to her. In pursuance of the agreement, the wife executed the mortgage; it was foreclosed, and title to the real estate was thereby lodged in the mortgagee; the wife paid the debt to him, and after all that was done, he refused to convey the real estate to her.

It was held that the contract was within the statute of frauds, and that the wife was, therefore, not entitled to a decree for a specific performance, nor to a decree that the mortgagee held the land in trust for her.

In the case before us, the wife executed the contract on her part, by executing the mortgage. So she did in that case, and, in addition, paid the debt for which the mortgage was given. In that case, the promised conveyance was in consideration of the execution of the mortgage, and the payment of the debt by the wife. Here, the promised conveyance was in consideration of the execution of the mortgage by the wife.

The execution of the mortgage by appellant was but the payment of the consideration for which Groves agreed to convey to her the title to the lots, and was no more a part performance of the contract, so as to take it without the statute of frauds, than would have been a payment of money. That the payment of the purchase-money, in whatever way it may be paid, is not such a part performance of a parol contract for the sale of land as will take it without the statute of frauds, is well settled. *Suman v. Springate*, 67 Ind. 115

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(123); *Carlisle v. Brennan, supra*; *Railsback v. Walke*, 81 Ind. 409 (414); *Johns v. Johns*, 67 Ind. 440; *Wallace v. Long*, 105 Ind. 522 (55 Am. R. 222), and cases there cited.

It is averred in the complaint, as will be observed, that at the time the contract was made between Groves and appellant, and ever since until the institution of this suit, she was, and has been, in possession of the lots. It thus appears that the possession was not given or taken, in pursuance or by reason of the contract.

The possession, therefore, was not a part performance of the contract, so as to take it without the statute of frauds, because it preceded the contract. *Johns v. Johns, supra*, p. 444, and cases there cited; *Carlisle v. Brennan, supra*; *Railsback v. Walke, supra*; *Pearson v. East*, 36 Ind. 27.

The purpose of the statute of frauds is to prevent fraud and perjury; in other words, to prevent fraud by means of perjury. The philosophical reason why a part performance will take a parol contract without the statute is, that the acts constituting such part performance, of themselves, are to a greater or less extent evidence of the contract.

It is said by a standard author: "The general principle is, that the act of part performance must have reference to the contract, be in execution of it, and be an act which would be prejudicial to the party seeking performance, if the agreement were not enforced. The act performed should tend to show, not only that there has been an agreement, but also to throw light on the nature of that agreement, so that neither the fact of an agreement, nor even the nature of that agreement, rests solely upon parol evidence, the parol evidence being auxiliary to the proof afforded by the circumstances of the case itself." *Waterman Specific Performance of Contracts*, section 261.

Neither the simple payment of a sum of money, nor, what is equivalent, payment in something else, or in some other way, nor the continuation of possession, existing prior to the

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alleged contract, tends to throw light on the nature of the contract, or to show that there was such a contract.

We are constrained to hold, that the contract, as stated in the complaint, is within the statute of frauds, and that no such part performance is shown as takes it without the statute.

Nor is such fraud shown on the part of Groves, or his heirs, as will entitle appellant to a specific performance, notwithstanding the statute.

The most that can be said is, that after Groves had received from appellant the consideration for which he agreed to convey the lots to her, he neglected and refused, and his heirs still refuse, to convey them as agreed. If that were sufficient fraud to take the contract for the sale of land without the statute, then, in every case where the purchase-money is paid, the vendee might specifically enforce the parol contract for the conveyance of the land. Such is not the law, as shown by the authorities already cited.

Appellant relied upon the veracity and integrity of Groves, believing that he would fulfil his engagement. In that she was mistaken. He neglected, or, to put it stronger, refused, to convey the lots. Such a refusal is a moral wrong, but it is not such a fraud as will justify a decree for a specific performance, notwithstanding the statute of frauds. *Caylor v. Roe*, 99 Ind. 1 (8), and authorities there cited. See, also, *Parker v. Heaton*, 55 Ind. 1; *Irwin v. Hubbard*, 49 Ind. 350 (19 Am. R. 679); *Sands v. Thompson*, 43 Ind. 18.

We hold that the contract, as stated in the complaint, is within the statute of frauds, and that no such part performance or fraud is shown as would authorize a decree for a specific performance of the contract, notwithstanding the statute of frauds.

If there had been a part performance, such as the law recognizes, section 4908, R. S. 1881, would apply, and the contract might be specifically enforced.

Under the averments in the complaint, appellant is not

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entitled to the relief asked, upon the ground that Groves held, and his heirs now hold, the lots in trust for her. See *Mescall v. Tully*, 91 Ind. 96, and cases there cited.

It is not to be understood from what we here hold, and the reasons stated for so holding, that appellant is without remedy. Nor is it necessary for us to indicate what her remedy may be. That is indicated, if not definitely settled, by the cases cited by her learned counsel. See *Jarboe v. Severin*, 85 Ind. 496. See, also, *Wallace v. Long*, *supra*.

It is enough here that the facts stated in the complaint are not sufficient to entitle appellant to a decree giving her a title to the lots, through a specific performance of the contract between her and Groves.

Judgment affirmed.

Filed Feb. 15, 1887.

13,442.

GARRETT v. THE STATE.

CRIMINAL LAW.—Arson.—Indictment.—Occupancy of Dwelling.—In an indictment for arson, it is unnecessary to charge who was the occupant of the dwelling-house alleged to have been destroyed.

SAME.—Husband and Wife.—If a man unlawfully, feloniously, wilfully and maliciously sets fire to and burns the dwelling-house of his wife, wherein she permits him to live with her as her husband, he is guilty of arson, though he may have furnished the money to build the house.

SAME.—Weight of Evidence.—The Supreme Court will not disturb a verdict in a criminal case, on the sufficiency or weight of the evidence, where there is not an absolute failure of evidence on some material point.

INSTRUCTIONS TO JURY.—Presumption on Appeal.—Practice.—Where the court below erred in refusing to give to the jury instructions asked, but the record does not show that it contains all of the instructions given, it will be presumed on appeal, in aid of the judgment, that the law of the instructions refused had been given by the court of its own motion.

From the Henry Circuit Court.

109	527
127	527
109	527
138	559
139	533
109	527
142	167

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J. M. Brown and R. Warner, for appellant.

L. T. Michener, Attorney General, *G. W. Duncan*, Prosecuting Attorney, and *J. H. Gillett*, for the State.

Howk, J.—The indictment in this case charged, “that William Garrett, on the 25th day of June, 1886, at Henry county, in the State of Indiana, did then and there unlawfully, feloniously, wilfully and maliciously set fire to and burn a certain dwelling-house, then and there situate, of the value of one thousand dollars, then and there being the property of another person, to wit, Hannah Garrett, and did then and there, and thereby, unlawfully, feloniously, wilfully and maliciously, burn and destroy said property, to the damage thereof in the sum of one thousand dollars, contrary to the form of the statute,” etc.

Upon his arraignment, appellant filed his written plea or answer herein, in two paragraphs, in substance as follows: 1. That he was not guilty, as charged in the indictment; and 2. For a further and special answer, he averred that at the time of the commission of the alleged offence, charged in the indictment, he was of unsound mind.

To this second paragraph, the State replied by a general denial. The issues joined were tried by a jury, and a verdict was returned, finding appellant guilty as charged in the indictment, and assessing his punishment at confinement in the State’s prison for the term of five years, and a fine in the sum of one dollar. Over his motion for a new trial, the court rendered judgment against him on the verdict.

Errors are assigned here by the appellant, which call in question (1) the overruling of his motion to quash the indictment, (2) the overruling of his motion for a new trial, and (3) the sufficiency of the facts stated in the indictment to constitute a public offence. Only one objection to the indictment, or to the sufficiency of the facts stated therein to constitute a public offence, has been pointed out by appellant’s counsel, in their brief of this cause; and that is, that

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the indictment ought to have shown, by proper averment, who was the actual occupant of the dwelling-house burned. The crime for which appellant was indicted, and of which he was convicted, is defined and its punishment prescribed in section 1927, R. S. 1881. So far as applicable to the case in hand, this section provides as follows: "Whoever wilfully and maliciously burns or attempts to burn any dwelling-house or other building, finished or unfinished, occupied or unoccupied, whether the building be used or intended for a dwelling-house or for any other purpose; * * * the property so burned being of the value of twenty dollars or upwards, and being the property of another, * * * is guilty of arson, and, upon conviction thereof, shall be imprisoned in the State prison not more than twenty-one years nor less than one year, and fined not exceeding double the value of the property destroyed."

It is manifest from this statutory definition of the offence charged against the appellant, that the question of the occupancy of the dwelling-house, burned and destroyed, was an immaterial question, and that it was, therefore, wholly unnecessary to charge in the indictment who was the occupant of such dwelling-house. It was necessary, however, under the statute, that the indictment should show, as it did, that the dwelling-house burned was the property of another person than the defendant, and should give, as it did, the name of such other person. *Ritchey v. State*, 7 Blackf. 168; *Wolf v. State*, 53 Ind. 30. In the case under consideration, it was averred in the indictment, as we have seen, that the dwelling-house burned by appellant, as charged, was "the property of another person, to wit, Hannah Garrett."

On the trial of this cause, it was shown by the evidence that Hannah Garrett, the person named in the indictment as the owner of the dwelling-house burned, was the wife of the appellant, William H. Garrett, and that he and his wife, Hannah, occupied, used and dwelt in such house, as their

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habitation and dwelling-house. Upon this evidence and the facts shown thereby, appellant's counsel have predicated what they denominate as "the main question in this case," namely: Under our statute, the substance of which we have heretofore quoted, was the appellant guilty of arson, in setting fire to and burning, as he did, the dwelling-house, as charged in the indictment? At common law, arson is an offence against the possession, and, under that law, appellant could not be guilty of arson, in setting fire to and burning the dwelling-house while he was in lawful possession thereof, without reference or regard to the ownership of such property. *McNeal v. Woods*, 3 Blackf. 485; *State v. Wolfenberger*, 20 Ind. 242; 3 Greenl. Ev., sections 53 and 54, and notes.

In *Snyder v. People*, 26 Mich. 106, a case similar in many respects to the case we are now considering, it was held by the Supreme Court of Michigan, that arson is an offence against the habitation, and regards the possession rather than the property; and that a husband, living with his wife and having a rightful possession, jointly with her, of a dwelling-house which she owns and they both occupy, is not guilty of arson in burning such dwelling-house. It was further held by the same learned court, in the same case, that the statutes of the State of Michigan, for the protection of the rights of married women, had not changed the marital unity of husband and wife; nor had they changed the common law rule as to arson, where the burning is by the husband of the house of the wife, occupied by both as a dwelling or residence; that such burning would not be arson at common law, nor was it the burning of the dwelling-house of another, contemplated by the statute of Michigan, defining the offence of arson.

Appellant's counsel chiefly rely upon the doctrine of the case last cited for the reversal of the judgment, in the case under consideration. We are of opinion, however, that it can not be correctly said that our statutes, for the protection

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of the rights of married women, have made no change in the marital unity of husband and wife, as at common law, in so far, at least, as the separate property of the wife is concerned. Thus, in section 5117, R. S. 1881, in force since September 19th, 1881, it is provided as follows: "A married woman may take, acquire, and hold property, real or personal, by conveyance, gift, devise, or descent, or by purchase with her separate means or money; and the same, together with all the rents, issues, income, and profits thereof, shall be and remain her own separate property, and under her own control, the same as if she were unmarried."

Of course, these statutory provisions are, to some extent, in derogation of the common law, and must be construed strictly; but, in so far as they are inconsistent with the common law and the marital unity of husband and wife recognized therein, they must be regarded as the law of this State. This is settled by our decisions. *Haas v. Shaw*, 91 Ind. 384 (46 Am. R. 607); *Frazer v. Clifford*, 94 Ind. 482; *Dodge v. Kinzy*, 101 Ind. 102; *Barnett v. Harshbarger*, 105 Ind. 410.

Under these statutory provisions, declaring that the property of a married woman "shall be and remain her own separate property, and under her own control, the same as if she were unmarried," it must be held, we think, as we now hold, that the dwelling-house of Hannah Garrett, mentioned in the indictment, though occupied by her and her husband, the appellant, as a dwelling or residence, was the property of another person than the appellant, within the contemplation of our statute defining the offence of arson.

It will be readily seen from an examination of section 1927, *supra*, that arson as defined in our statute is a different offence, in many respects, from arson at the common law. Arson as defined in our statute is an offence against the property, as well as the possession; and the question of occupancy or non-occupancy, habitation or non-habitation, of or in the property, as we have seen, becomes and is an immaterial question,

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in view of the statutory definition of the offence. It is the law of this State, we think, that if a man unlawfully, feloniously, wilfully and maliciously sets fire to and burns the dwelling-house of his wife, wherein she permits him to live with her as her husband, he is guilty of the crime of arson, as such crime is defined in our statute.

It is claimed that the trial court erred in excluding certain evidence offered by appellant, tending to prove that he had furnished certain money to pay for building the house. There was no available error, we think, in the exclusion of this offered evidence. Even if he had furnished all the money to build the house, it became and was the property of his wife; and, in setting fire to and burning such house, he was guilty of arson.

Appellant's counsel also complain of the court's refusal to give the jury certain instructions at their request. In their brief of this cause, counsel show very clearly, as it seems to us, that the trial court gave the jury, of its own motion and in its own language, the law of the instructions asked for by them and refused. Besides this, it is not shown by the record that it contained all of the court's instructions to the jury; and in such case, if it appeared that the court erred in its refusal to give any instruction, we would be bound to presume in aid of the judgment, that the law of such instruction had been given to the jury by the court of its own motion. *Fitzgerald v. Jerolaman*, 10 Ind. 338; *Myers v. Murphy*, 60 Ind. 282; *Stott v. Smith*, 70 Ind. 298.

Finally, appellant's counsel question in argument the sufficiency of the evidence to sustain the verdict. It is not claimed that there is an absolute failure of evidence, on any material point, to sustain the verdict; and it has been approved by the trial court. In such case, we can not disturb the verdict, even in a criminal cause, upon the weight or sufficiency of the evidence. *Hudson v. State*, 107 Ind. 372, and cases there cited.

The State, *ex rel.* Horrall, Drainage Commissioner, v. Thompson, Trustee.

We have found no error in the record which requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed Feb. 18, 1887.

No. 12,428.

109	533
141	435

THE STATE, EX REL. HORRALL, DRAINAGE COMMISSIONER,
v. THOMPSON, TRUSTEE.

DRAINAGE.—Highway.—Assessment Against Township.—Enforcement by Mandate.—A township may be assessed, in a drainage proceeding, for benefits to a highway, and when the assessment is properly made, payment may be enforced by mandate.

From the Knox Circuit Court.

W. A. Cullop, G. W. Shaw and C. B. Kessinger, for appellant.

G. G. Reily and W. C. Niblack, for appellee.

ELLIOTT, C. J.—The petition avers that the relator is one of the commissioners of drainage appointed by the Knox Circuit Court; that proceedings were prosecuted for establishing a ditch and assessing the expense of constructing it upon land-owners; that the petition for the ditch alleged that its construction would benefit a public highway belonging to Decker township, of which township the appellee is the trustee; that notice of the petition in the drainage case was given to the trustee; that the assessment against Decker township was two hundred dollars, and that a final order approving reports and assessments was made by the court.

It is also alleged that the trustee has in his hands funds belonging to the township sufficient to pay the assessment.

The State, *ex rel.* Horrall, Drainage Commissioner, v. Thompson, Trustee.

The prayer is for a writ of mandate to compel the trustee to pay the assessment.

Under the decision in *Young v. Wells*, 97 Ind. 410, the assessment against the township was properly made, and, if properly made, it must be enforceable. The case cited has been followed and approved in a subsequent case, and must be regarded as correctly expressing the law. *Grimes v. Coe*, 102 Ind. 406.

As the court had authority to make the assessment, it is legally enforceable against the township. There is no discretion in the township trustee to pay, or refuse to pay, an assessment made by the court in a drainage proceeding, for, after the case has been determined by a judgment, the question of the validity of the assessment is conclusively established as against a collateral attack. If there is a valid assessment, it is the imperative duty of the township trustee to pay it if he has money belonging to the proper funds in his hands. A duty of such a character may be enforced by mandate.

The decision in *Jones v. Dunn*, 90 Ind. 78, does not, when properly understood, conflict with the decision in *Young v. Wells*, *supra*. All that is decided in the former case is, that, under the statutes there referred to, the superintendent of roads is the proper officer to determine the expediency of filing a petition to construct a ditch for the benefit of a highway.

The judgment in the ditch case concludes the appellee as to all questions which might have been properly litigated in that case, so that the only question presented by this record is as to the jurisdiction of the court to render that judgment, and, as we have seen, it did possess that jurisdiction. All questions as to the regularity of those proceedings are settled by that judgment, and nothing now remains for the trustee to do but to pay the assessment. It is not necessary for the superintendent of roads to order the payment of the assess-

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ment, for that was done much more effectually by the judgment in the ditch proceedings than the superintendent could do it.

Judgment reversed, with instructions to overrule the demurrer to the complaint.

Filed Feb. 15, 1887.

109	535
124	364

No. 13,387.

PIERCE v. THE STATE.

PRACTICE.—*Exception to Opinion Instead of Decision.*—*New Trial.*—*Criminal Law.*—An exception to the *opinion* of the court in overruling a motion for a new trial, instead of to its *decision*, which is more technically accurate, is sufficient to present the question.

INTOXICATING LIQUOR.—*Sale on Sunday.*—*Evidence.*—The appellant kept a hotel, to which a saloon, owned by him, was attached. It was separated from the hotel office by a hall, from which doors opened into each. The prosecuting witness entered the office on Sunday and passed through the hall into the saloon. The appellant was not present, nor did the witness see him about the premises, but one of his boarders and two or three other persons were in the saloon, standing some distance from the bar. The witness asked the boarder if he had any beer, and the latter replied: "There is a bottle; why don't you take it?" A bottle of beer and a beer glass were on the counter. The witness poured out a glass of beer, drank it, left the price of the drink on the counter and passed out by the way he had entered.

Held, that the evidence is sufficient to sustain a verdict finding the appellant guilty of an unlawful sale on Sunday.

Held, also, that the conversation between the prosecuting witness and the boarder was properly admitted in evidence.

From the Kosciusko Circuit Court.

J. S. Fraser, W. D. Fraser and L. H. Haymond, for appellant.

L. T. Michener, Attorney General, and *J. H. Gillett*, for the State.

MITCHELL, J.—The appellant was convicted in the court

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below of having unlawfully sold intoxicating liquor on Sunday, contrary to the statute.

The overruling of his motion for a new trial is the only error discussed here.

The attorney general makes the point that the record fails to show that the appellant excepted to the ruling or decision of the court, in overruling the motion for a new trial.

In that connection the record entry made by the clerk recites as follows: "And the court, being sufficiently advised in the premises, does now overrule said motion, to which *opinion* of the court the said defendant by counsel excepts."

Section 1845, R. S. 1881, sec. 270 of the code regulating criminal procedure, enacts, in substance, that a defendant may take an exception to any *decision* of the court, etc.

"Opinion" and "decision," it is said, are not synonymous in meaning, and, therefore, an exception to the opinion of the court is not an exception to its decision.

The terms "opinion" and "decision" are sometimes used interchangeably in the statute. Thus, in section 1846, the provision is, that the prosecuting attorney may except "to any *opinion* of the court," and reserve the point of law for the decision of the Supreme Court. Whether the exception in a criminal proceeding be by the defendant, or by the prosecuting attorney, it must relate to some ruling or decision made in the progress of the case. While it is doubtless more technically accurate to except to the decision of the court, it is equally available to present the question, if the exception be to the opinion. Although the court may announce its ruling and the reasons therefor, orally, it is well understood that an exception, taken by either party at the time, is an exception to the ruling or decision, made upon the matter before the court, and not to the reasons or opinion which the court may have given. The case of *Houston v. Williams*, 13 Cal. 24, is distinguishable.

The chief contention of the appellant is, that the evidence fails to sustain the verdict of the jury.

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The facts make a case like this: The appellant kept a hotel near the depot, in Warsaw, Indiana, to which there was a saloon attached. There was a hall in the building, between the hotel office and the saloon. In this there were doors which communicated into the office and saloon respectively. The room in which the saloon and bar were kept was, so far as appears, devoted exclusively to the saloon business, leaving no occasion to keep it open on Sunday, so far as carrying on the business of the hotel was concerned. The saloon was kept by the appellant. The liquors therein belonged to him.

The witness to whom the sale was charged to have been made testified, that he went into the hotel office on Sunday, and that he did not remember to have seen either the appellant or his clerk about. He passed from the office through the hall into the saloon. He found there a man by the name of Gundecker and two or three others, all of whom were standing some distance from the bar. Gundecker was a boarder at the appellant's hotel. The witness asked Gundecker whether he had any beer. The latter replied: "There is a bottle, why don't you take it." There was a bottle of beer and a beer glass on the counter. The witness took the bottle, poured out a glass of beer, and drank it. Leaving a nickel on the counter, he passed out by the way he entered into the hotel office. This is the substance of all the evidence given in the cause.

It was not explained how the saloon came to be open on Sunday, with the appellant's boarder and two or three other persons in it; nor was there any explanation of how it came about, that the bottle of beer and glass were so conveniently displayed on the counter; nor by what authority the boarder presumed upon the liberality of his host, when he directed the attention of the witness to the bottle and glass on the counter; nor why the witness thought the propriety of the occasion demanded that he should leave the price of the drink on the counter. All this may have occurred without the appellant's knowledge or consent. The facts were, however,

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capable of supporting a different conclusion. The jury may have inferred that the method resorted to was a means of evading the statute, which makes it a misdemeanor to sell, barter or give away any intoxicating liquor, to be drunk as a beverage, on Sunday. This inference must have been drawn by the jury, otherwise an acquittal must have followed.

The sale, barter or gift of intoxicating liquors on Sunday, to be drunk as a beverage, stands upon a somewhat different basis from similar transactions on a secular day. There are no circumstances under which sales, for such a purpose, can be lawfully made on that day. In contemplation of law, that, like other secular business, is to be suspended on Sunday, persons are ordinarily held to take some notice whether or not the law is being violated in the conduct of a business which is under their control, and which is being conducted on premises which they themselves occupy.

When, therefore, the State had made it to appear in evidence, that a sale, or what amounted to a sale, of intoxicating liquors had been made on Sunday, in the appellant's saloon, which was in a building which the appellant himself occupied, and by a person who was apparently in control of the saloon at the time, such facts were presented as authorized the jury to infer that the saloon was open, and the sale was made with the appellant's consent.

It was not necessary that the appellant should have authorized or directed the particular sale in question. The fact that ready access was obtainable to the saloon, and that three or four persons were already there when the prosecuting witness entered, and all the circumstances taken together, may have induced the belief in the minds of the jury, that the saloon was accessible to all such as knew the way, and that liquors were obtainable by doing as the witness did. The case is not distinguishable from *Showalter v. State*, 84 Ind. 562, and *Dant v. State*, 83 Ind. 60. It is in its facts like the case of *Stultz v. State*, 96 Ind. 456.

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Where facts, from which guilt may fairly be deduced, are left wholly unexplained, and the jury draw the inference that the defendant is guilty, this court is not authorized to reverse.

Objection is made to the ruling of the court in permitting the prosecuting witness to detail to the jury what was said by the witness to Gundecker, and by the latter in reply, at the time the beer was obtained.

It is said that the conversation was had in the appellant's absence, and that there was no proof that Gundecker was the agent or bartender of the appellant. As we have already seen, the saloon, which was part of the same building in which the appellant resided, was open on a day when the prosecution of the business therein conducted was unlawful. Gundecker was there assuming control or authority over the appellant's property. In pursuance of his authority, real or assumed, a sale of liquor resulted. The State had the right to show the facts and surrounding circumstances, and leave them for further explanation, or for such legitimate inference as might arise from them. There was no error in admitting the evidence.

The bill of exceptions recites that during the closing argument, the prosecuting attorney remarked upon the difficulty of securing convictions in cases like this, and, further, that an acquittal in this case would be an assurance to the appellant to continue selling liquor to boys on Sunday, and other remarks of a similar character, to which exception was taken by the defendant.

The record does not disclose what action was taken by the court in respect to the matters excepted to, or that the attention of the court was called to the objectionable parts of the prosecutor's speech. Whatever may be said of the remarks to which exceptions were taken, they were not such an abuse of the prosecutor's privilege that they may not have been set right by proper admonition from the court, at the time.

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We find no error which could have prejudiced the substantial rights of the appellant. The judgment is, therefore, affirmed, with costs.

Filed Feb. 15, 1887.

No. 12,311.

HARRIS ET AL. v. CARPENTER ET AL.

WILL.—Construction.—Vested and Contingent Remainders.—The law favors vested estates, and no remainder will be construed to be contingent which may, consistently with the intention, be deemed vested.

SAME.—Survivorship.—Intention.—Survivorship is generally, in the absence of an expressed or fairly implied intention to the contrary, construed to refer to the testator's death.

SAME.—Vested Remainder.—A testator devised certain land to his wife for life, providing that "at her death the same shall be the property of and pass to my daughter, L., in fee; but if she, said L., be not living, then to her heirs forever."

Held, that the survivorship referred to the testator's death, and that the daughter took a vested remainder in fee.

From the Marion Superior Court.

A. C. Harris and W. H. Calkins, for appellants.

J. S. Duncan, C. W. Smith and J. R. Wilson, for appellees.

NIBLACK, J.—The complaint in this case alleges that, on the 4th day of September, 1871, Obadiah Harris, then being the owner of certain real estate situate in the county of Marion, in this State, upon which he resided, together with certain personal property, executed and published his will disposing of all of his property; that the said Harris died in April, 1875, being still the owner of the property described in his said will; that said will was afterwards duly admitted to probate, the substantial part of which is as follows:

"Item 1. I give and devise to my wife, Ruth Harris, all

109	540
129	68
139	259
109	540
133	394
133	606

109	540
138	510

109	540
143	290
143	339

109	540
144	575
146	329

109	540
149	56
152	496

109	540
165	203
165	204

109	540
166	453

109	540
171	384

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of the stock, household goods, furniture, provisions, farming implements and other goods and chattels on my farm, and which I may own at the time of my decease, to be hers forever.

“Item 2. I further give and devise to her, in lieu of her interest in my lands, the following part and parcel of the farm in Wayne township, Marion county, State of Indiana, on which we now reside, bounded and described as follows, to wit:” (Then comes a description of the land). “She, my said wife, to have the same after my death for and during the period of her natural life; and at her death the same shall be the property of and pass to my daughter, Laura Carpenter, the wife of Henry W. Carpenter, in fee; but if she, said Laura, be not living, then to her heirs forever.

“Item 3. The remainder of my said farm, bounded and described as follows:” (Describing the land); “shall, after my death, be sold by my executor in such manner and on such terms as may be deemed best for the purpose of realizing the greatest sum therefor; and the proceeds arising therefrom I give and devise to my heirs other than the said Laura and my said wife, to be distributed by my executor in the following manner, that is to say:

“(1) To my daughter, Hannah Wilson, wife of Andrew Wilson, one-seventh ($\frac{1}{7}$) part thereof.

“(2) To Nancy Ballard, my daughter, wife of Joseph Ballard, the one-seventh ($\frac{1}{7}$) part thereof.

“(3) To my daughter, Naomi Johnson, wife of Marion Johnson, the one-seventh ($\frac{1}{7}$) part thereof.

“(4) To my son, John Haney Harris, the one-seventh ($\frac{1}{7}$) thereof.

“(5) To my granddaughter, Dora Miller, one-seventh ($\frac{1}{7}$) thereof.

“(6) To my two granddaughters, Narcissa Cuttington and Minerva Gotham, heirs of my daughter Avis, now deceased, each one-half ($\frac{1}{2}$) of one-seventh ($\frac{1}{7}$) thereof.

“(7) To the heirs of my son, Lewis Harris, deceased, the

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one-seventh (†) thereof, to be divided between them in the proportion provided by law in case of descent of property to them from me at the time of my death.

“Item 4. After my just debts are paid, I give the rest of my property, of which I may die seized, both personal and real, after paying to my wife, Ruth, the sum of one thousand dollars (\$1,000), to my grandchildren living at the time of my death, to be divided equally between them.”

“Item 5” names the executor.

The complaint further alleges that, at the time of his death, the deceased left surviving him the plaintiff, Ruth Harris, who was a second wife, his daughter Laura, who at the date of the will was the wife of Henry W. Carpenter, she being the only child by such second wife; that the persons named in the third item of the will were children of the testator by a former marriage and their descendants; that Ruth and said Laura are both living, and said Laura has had two children born of her, namely, George William Carpenter, born before the date of the will, and Addison H. Carpenter, born on the 6th day of March, 1876; that the widow and Mrs. Carpenter took possession of the land described in “Item 2” of the will, immediately upon the death of the testator, the widow having elected to take under the will; that subsequently they subdivided “a small portion of said lands” adjoining the village of Mount Jackson; that said Ruth and Laura, with the husband of the latter, sold and conveyed certain of these lots; and it is to quiet the title to such lots that the action is instituted, upon the ground that the estate of Mrs. Carpenter is claimed by many persons to be contingent upon her survivorship of her mother, and that a cloud is thereby cast upon her title to the land, in the sale and conveyance of which she has so joined. Mrs. Carpenter’s children, above named, are made the only defendants.

The court below, at special term, sustained a demurrer to the complaint, and accordingly gave judgment in favor of the defendants, and this judgment was affirmed at general term.

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In argument, the sufficiency of the complaint is made to turn upon the question whether Mrs. Carpenter took a vested or only a contingent remainder in the land devised to her mother and to her, upon the death of the testator.

Blackstone, in his Commentaries, volume 2, p. 163, after referring to some of the characteristics of an estate in remainder, proceeds: "An estate then in *remainder* may be defined to be an estate limited to take effect and be enjoyed after another estate is determined. As if a man seized in fee simple granteth lands to A. for twenty years, and, after the determination of the said term, then to B. and his heirs forever; here A. is tenant for years, remainder to B. in fee. In the first place, an estate for years is created or carved out of the fee, and given to A., and the residue or remainder of it is given to B. But both these interests are in fact only one estate; the present term of years and the remainder afterwards, when added together, being equal only to one estate in fee. They are indeed different *parts*, but they constitute only one *whole*; they are carved out of one and the same inheritance; they are both created, and may both subsist, together; the one in possession, the other in expectancy."

Kent, in his Commentaries, vol. 4, p. 202, in treating of an estate in remainder, says: "It is 'when there is a person in being who would have an immediate right to the possession of the lands, upon the ceasing of the intermediate or precedent estate.' A grant of an estate to A. for life, with the remainder in fee to B., or to A. for life, and after his death to B. in fee, is a grant of a fixed right of immediate enjoyment in A., and a fixed right of future enjoyment in B. * * * Reversions, and all such future uses and executory devises as do not depend upon any uncertain event or period, are vested interests. A vested remainder is a fixed interest, to take effect in possession after a particular estate is spent. If it be uncertain whether a use or estate limited *in futuro* shall ever vest, that use or estate is said to be in contingency. But though it may be uncertain whether a remainder will

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ever take effect *in possession*, it will nevertheless be a vested remainder if the interest be fixed. The law favors vested estates, and no remainder will be construed to be contingent, which may, consistently with the intention, be deemed vested."

In Jarman on Wills, vol. 2, at page 406, it is stated that "The law is said to favor the vesting of estates; the effect of which principle seems to be, that property which is the subject of any disposition, whether testamentary or otherwise, will belong to the object of gift immediately on the instrument taking effect, or so soon afterwards as such object comes into existence, or the terms thereof will permit. As, therefore, a will takes effect at the death of the testator, it follows that any devise or bequest in favor of a person *in esse* simply (*i. e.*, without any intimation of a desire to suspend or postpone its operation,) confers an immediately vested interest. * * * * Thus, where a testator devises lands to A. for life, and after his decease to B. in fee, the respective estates of A. and B. (between whom the entire fee simple is parcelled out) are both vested at the instant of the death of the testator, the only difference between the devisees being, that the estate of the one is in possession, and that of the other is in remainder."

On the same subject, see Hawkins Wills, 222; Schouler Wills, section 560; *Doe v. Considine*, 6 Wallace (U. S.) 458; *Nicoll v. Scott*, 99 Ill. 529; *Davidson v. Koehler*, 76 Ind. 398.

As regards the *survivorship*, often made a condition, turning point, or controlling event in the disposition of property by a will, it is generally, in the absence of an expressed or fairly implied intention to the contrary, construed to refer to the testator's death.

The older authorities are strongly in favor of so referring the term when it is used, but the more recent cases have somewhat modified the strong leaning of these older authorities, and the recognized doctrine is now substantially as above stated. Hawkins Wills, 262; *Rogers v. Towsey*, 9 Jurist, 575; *Nicoll v. Scott*, *supra*; 3 Jarman Wills, 572.

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A will ought to be construed, not only so as to make it accord with the fairly and lawfully expressed intention of the testator, but in such a way as to make it, so far as practicable, a harmonious whole. *Cooper v. Hayes*, 96 Ind. 386.

Construing the will before us in the light of the foregoing authorities, we have reached the conclusion that the survivorship provided for in the last clause of the second item had reference to the time of the death of the testator, and that upon his death Mrs. Carpenter became seized of a vested remainder in fee in the land devised by that item of the will. It was evidently the intention of the testator to dispose of his entire estate in this land at the time of his death, and, as he only devised a life-estate in it to his wife, and as the fee simple had, in the meantime, to lodge somewhere, it could not, under the provisions of the item of the will in question, have reasonably done otherwise than to vest in Mrs. Carpenter, who was then alive, and for whom, and whose heirs, the entire estate in remainder was ultimately intended.

The court below at general term consequently erred in affirming the judgment at special term.

The judgment is reversed, with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

Filed Feb. 19, 1887.

No. 13,507.

PATTEE v. THE STATE.

CRIMINAL LAW.—*Affidavits*.—*Appeal*.—*Record*.—*Recital of Clerk*.—*Affidavits can not be made part of the record by a mere recital of the clerk*.
 SAME.—*Plea of Guilty*.—*Refusal to Permit Withdrawal*.—*Discretion*.—In the absence of a showing that there was an abuse of discretion, the refusal of the trial court to permit the withdrawal of a plea of guilty will be upheld.

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SAME.—Information.—Supreme Court.—Assignment of Error.—Practice.—The sufficiency of an information may be questioned for the first time in the Supreme Court by an assignment of error, but only on the ground that it does not charge a public offence.

SAME.—False Pretences.—Information.—It is necessary to the validity of an information for obtaining money by false pretences, to aver that the pretences upon which the money was obtained were false.

From the Madison Circuit Court.

W. A. Kittinger, L. M. Schwinn and E. B. McMahan, for appellant.

L. T. Michener, Attorney General, and *J. H. Gillett*, for the State.

ELLIOTT, C. J.—On the 20th day of March, 1886, the appellant entered a plea of guilty to the information filed against him, and, on the 23d day of that month, judgment was pronounced. On the 30th day of the same month, the appellant asked leave to withdraw his plea of guilty, but the court denied his request.

The record recites that an affidavit was filed by him, but as it was not made part of the record in any legal method, it can not be examined by us. Affidavits can not be made a part of the record by a mere recital of the clerk.

We can not say that the court erred in refusing to permit the appellant to withdraw his plea of guilty. The presumption is in favor of the ruling of the court, and in the absence of a clear and strong showing that there was an abuse of discretion, the ruling must be sustained.

An information may be assailed for the first time by the assignment of errors. *Henderson v. State*, 60 Ind. 296; *O'Brien v. State*, 63 Ind. 242. But the only ground upon which such an attack can be successfully maintained is, that the information does not charge a public offence. Mere uncertainty or inaccuracy in charging the offence will not be sufficient, for the assignment of errors does not perform the same office as a motion to quash. *Trout v. State*, 107 Ind. 578. The question in this case, therefore, is, does the

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information charge a public offence? In our opinion it does not, for the reason that it does not negative the representation upon which it is alleged the appellant procured money from James Bain. It is indispensably essential to the validity of an information for obtaining money by false pretences to aver that the pretences upon which the money was obtained were false. The offence can not exist without this essential element.

Judgment reversed, with instructions to quash the information.

Filed Feb. 18, 1887.

No. 12,720.

CARVER v. COFFMAN.

PARTITION.—Improvements.—Occupying Claimant.—Where one is in possession of land under color of title, and makes, in good faith, lasting and valuable improvements thereon, he is entitled to have their value taken into account in awarding partition, although made without the knowledge or consent of his cotenant.

SAME.—Rents and Profits.—Liability of One Cotenant to Another.—Where one cotenant is in possession of the whole of the common property, denying the other cotenant's title, and excluding him from possession and from participation in the income of the property, he is liable to the latter for all profits he has received in excess of his just proportion.

From the Madison Circuit Court.

H. D. Thompson and T. B. Orr, for appellant.

C. L. Henry and H. C. Ryan, for appellee.

Howk, J.—In this case appellee Coffman sued appellant Carver to obtain the partition of certain real estate, particularly described, in Madison county. In his complaint, appellee alleged that he was the owner of the undivided two-thirds part, and the appellant was the owner of the undivided one-third part, of such real estate.

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100	547
164	93
100	547
170	314

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The cause was put at issue and tried by the court, and a finding was made for appellee that he was the owner of the undivided two-thirds part of the real estate in controversy, and that appellant was the owner of the residue thereof, and an interlocutory order was entered, awarding partition as prayed for in the complaint, and appointing commissioners to make such partition. Afterwards, such commissioners made their report of such partition, and, over appellant's motion to set it aside, the court rendered final judgment, confirming such report and partition; and appellant's motion for a new trial having been overruled, she has appealed from such judgment to this court.

The first error of which appellant complains here in argument is the sustaining of appellee's demurrer to the second paragraph of her answer herein.

It may be premised that, in his complaint for partition, after having stated the respective interests of the parties, as hereinbefore stated, in the real estate in controversy, the appellee averred that while he and his immediate and remote grantors were in the full, complete, unquestioned and undisturbed possession of all of such real estate, and before appellant made any claim to such real estate, appellee and his immediate and remote grantors made lasting and valuable improvements, of the value of \$1,000, on such real estate, all of which was done with appellant's knowledge; and appellee asked that, in making partition of such real estate, said improvements be taken into account and appellant's interest in the real estate be duly charged therewith. Appellant's defence of this suit was addressed to appellee's claim for the value of such improvements.

In the second paragraph of her answer "to so much of the complaint as seeks to recover for improvements made on the land," appellant averred that appellee was the owner of the undivided two-thirds in value of such real estate, and that appellant was the owner of the remaining one-third part in value thereof; that appellee and his grantors had held the

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continued possession of all of such real estate for the last eight years, under and by a claim of right to all of such real estate, and, during all that time, had asserted that appellant had no right or title to any part of such real estate, and had refused to permit her to possess, hold or enjoy, or to enter upon, any part thereof; that when said improvements were made, if made at all, neither appellee nor any of his grantors were tenants in common with appellant of such real estate; and that said improvements were made without the knowledge or consent of appellant, and that she was not liable, therefore, for the payment of any part of the value of such improvements.

We are of opinion, that the facts stated by appellant, in this second paragraph of answer, were not sufficient to constitute a valid bar to appellee's claim for the value of the lasting improvements made by him and by those under whom he claims, on the real estate in controversy. It is alleged in such paragraph of answer, that appellee and his grantors had held continued possession of all such real estate for the last eight years, under and by a claim of right to all such real estate. What this claim of right was, under which appellee had held such possession of all the real estate in controversy, is not shown by any averment in the paragraph of answer we are now considering. As against the appellant, it may be fairly assumed, however, that this claim of right was of such a character as gave the appellee and his grantors "color of title" to all the real estate in controversy. This being so, and the absolute "good faith" of appellee and his grantors in making the lasting and valuable improvements, mentioned in the complaint herein, on such real estate, having been in no manner questioned or controverted by appellant, it follows of necessity, as it seems to us, that when appellee was afterward, in the proper action, found not to be the rightful owner of the undivided one-third part of such real estate, he then and there and thereby acquired a valid, legal and equitable claim for the value of such improvements, and to

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have the same taken into the account in the future partition of such real estate between him and the rightful owner of such undivided interest therein. Section 1074, R. S. 1881. The claim asserted by appellee, in relation to the value of his lasting improvements, is strongly analogous to that of an occupying claimant; and as the provisions of our code concerning occupying claimants are purely equitable, we know of no reason, and, certainly, none is shown in the second paragraph of appellant's answer, why such provisions should not be held applicable to the questions now under consideration.

It will be observed that, in the second paragraph of her answer, appellant alleged that, when such improvements were made, neither appellee nor any of his grantors were tenants in common with appellant of the real estate in controversy. This may be true, perhaps, but even if it be true, it is certain that, under other averments of such paragraph, appellee and his grantors were cotenants of some kind with the appellant of such real estate. It may be true also, as alleged in such paragraph of answer, that the improvements on such real estate were made without the knowledge or consent of appellant, and that, for this reason, she was not liable for the payment of any part of the value of such improvements. But while all these averments may be true, it does not follow by any means that a court of equity ought not to take such improvements into account in awarding partition of such real estate between appellant and appellee. On this subject, in *Freeman on Cotenancy*, section 509, it is said: "The law declines to compel one cotenant to pay for improvements made without his authorization; but it will not, if it can avoid so inequitable a result, enable a cotenant to take advantage of the improvements for which he has contributed nothing. When the common lands come to be divided, an opportunity is offered to give the cotenant who has enhanced the value of a parcel of the premises the fruits of his expenditures and industry, by allotting to him the

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parcel so enhanced in value, or as much thereof as represents his share of the whole tract. 'It is the duty of equity to cause these improvements to be assigned to their respective owners, (whose labor and money have been thus inseparably fixed on the land,) so far as can be done consistently with an equitable partition.' " *Scale v. Soto*, 35 Cal. 102; *Mahoney v. Mahoney*, 65 Ill. 406; *Elrod v. Keller*, 89 Ind. 382.

Our conclusion is, that the trial court committed no error in sustaining appellee's demurrer to the second paragraph of appellant's answer.

The next error, of which complaint is here made by appellant, is the sustaining of appellee's demurrer to the third paragraph of appellant's answer.

This paragraph of answer, like the second paragraph, was an answer to so much only of the complaint herein, "as seeks to recover for improvements made upon the real estate asked to be partitioned." In this third paragraph, appellant first alleged substantially the same facts as were stated by her in the second paragraph of her answer; and then she further averred that appellee and his grantors, for the last eight years, had and enjoyed the full and entire possession of all such real estate, and that the annual rental value thereof, during that time, was \$120, amounting in the aggregate for such eight years to the sum of \$960, the one-third part of which aggregate amount, to wit, the sum of \$320, was due and owing to appellant, and she asked that the sum, so due and owing her, might be recouped and taken from any amount that might be found due the appellee for such improvements.

We are of opinion that the trial court clearly erred in sustaining appellee's demurrer to this third paragraph of appellant's answer. Ordinarily, no doubt, one cotenant is not bound, in the absence of express contract, to pay rent while he remains in possession of the common property. But where, as here, a cotenant in possession of the common property, as alleged in the third paragraph of answer and

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admitted to be true by the demurrer thereto, has for eight years denied that the other cotenant had or held any title, right or claim to any part of such property, and, during all that time, has kept the other cotenant out of the possession of every part of such property, and has refused during all that time to permit her to make any entry upon the common property, or to receive any part of the annual income or rents thereof, it is very clear that a cotenant thus in possession of the common property is bound to account to the excluded cotenant for what he has received by such possession, more than his just proportion of the annual income or rents and profits of such property. *Estep v. Estep*, 23 Ind. 114; *Crane v. Waggoner*, 27 Ind. 52; *Winings v. Wood*, 53 Ind. 187; *Elrod v. Keller*, *supra*; *Humphries v. Davis*, 100 Ind. 369; *Scott v. Guernsey*, 48 N. Y. 106; *Early v. Friend*, 16 Gratt. 21, 47; *Hayden v. Merrill*, 44 Vt. 336, 348; *Shiels v. Stark*, 14 Ga. 429; *Freeman Cotenancy*, section 506.

Both in law and in equity, appellant has shown by the averments of the third paragraph of her answer, or, properly speaking, her counter-claim herein, a just and valid claim for her share or interest in the rents and profits of the common property. The facts stated by her, in such answer or counter-claim, were amply sufficient to entitle her to the relief she demanded therein, and it was error in the court below to sustain appellee's demurrer thereto. This conclusion renders it unnecessary for us to consider now the other errors assigned by appellant upon the record of this cause.

The judgment is reversed, with costs, and the cause is remanded with instructions to overrule the demurrer to the third paragraph of answer, and for further proceedings not inconsistent with this opinion.

Filed Feb. 23, 1887.

Chandler v. Spencer.

No. 12,024.

CHANDLER v. SPENCER.

MARRIED WOMAN.—*Promissory Note.*—*Consideration.*—*Principal and Surety.*

—*Pleading.*—Where, in an action against a married woman, on a promissory note, she answers her coverture, and that she executed the note as surety for a co-defendant, a reply that the consideration of the note was personal property purchased by her for use in her separate business, is good, without alleging that the property was delivered to or received by her.

SAME.—*Purchase of Personal Property.*—*Delivery to Third Person.*—*Evidence.*

—For evidence held sufficient to sustain a finding against a married woman, holding her liable as principal upon a promissory note executed for personal property contracted for and delivered to another, see opinion.

From the Howard Circuit Court.

W. R. Payne, R. Vaile and F. Cooper, for appellant.

J. L. Custer, J. C. Blacklidge, W. E. Blacklidge and B. C.

H. Moon, for appellee.

MITCHELL, J.—Robert J. Spencer brought this suit against Malinda A. and Richard M. Chandler, to recover the amount due on three promissory notes alleged to have been executed by the defendants to one Butler. The notes were payable at a bank in this State. It is alleged that they were assigned for a valuable consideration before their maturity.

Malinda A. Chandler answered that she was a married woman at the time she executed the notes, and that she received no part of the consideration upon which the notes were given, but signed them merely as the surety for her co-defendant, Richard M. Chandler.

To this answer the plaintiff replied that the consideration of the notes was certain personal property, purchased by Malinda A. Chandler, for use in her own separate business, from the payee named in the notes.

This reply was held sufficient on demurrer. The appellant claims that this ruling was erroneous. She makes the point that because the reply does not aver that the personal prop-

109	553
125	256
125	569
126	203
109	553
150	164

Chandler v. Spencer.

erty, alleged therein to have been purchased by her, was delivered to or received by her, it is not sufficient. *Rothschild v. Raab*, 93 Ind. 488; *Wulschner v. Sells*, 87 Ind. 71.

The question raised upon the pleading relates to the character in which the appellant signed the notes, whether as principal or surety. If it was true that the consideration of the notes was personal property purchased by the appellant for use in her own separate business, she was not surety. If the property never was delivered in pursuance of the contract of purchase, that fact might constitute a good defence to the notes, but, of itself, it would not constitute the purchaser a surety, nor would the defence of suretyship be available, merely because there had been a failure to deliver the property purchased.

The appellant claims that the finding of the court is not sustained by the evidence, and that her motion for a new trial should therefore have been sustained.

The notes were executed in April, 1883. There is no dispute but that the appellant was a *femme covert* at the time.

The evidence tends to show that Mrs. Chandler owned and kept a hotel at Russiaville, in Howard county. Richard M. Chandler was her nephew. He is sometimes spoken of as her adopted son. He was about twenty years old at the time, and had been raised by Mrs. Chandler. Butler, the payee of the notes, was a manufacturer of carriages, residing at Marion, Indiana. R. M. Chandler negotiated with Butler for a carriage, two buggies and a sample-wagon. At the time the vehicles were ordered he told Mr. Butler that his aunt would purchase them; that she was intending to start him in the livery business. Before the carriages were shipped, Butler went to Russiaville and saw Mrs. Chandler. He testified that he told her that the vehicles had been ordered, and asked her whether it was satisfactory to her, and that he said to her that he was selling them to her. He testified further, that she told him at the time that she was starting the young man up in business, that she was buying the property for him. He

Chandler v. Spencer.

then produced the notes and directed her where to sign her name. She signed them as directed, and requested that R. M. Chandler should sign also, which he accordingly did, Butler saying at the time that it was immaterial to him whether the young man signed the notes or not. The vehicles were subsequently shipped to R. M. Chandler, one of them having his name painted thereon. The vehicles were kept and used in the barn owned by Mrs. Chandler. So far as the testimony shows the property and livery business were under the control of R. M. Chandler.

It does not appear from the testimony whether the appellant ever had, or claimed any control over, or ownership in, the property after it was placed in the barn on her premises.

The question is, whether upon the facts stated the appellant is liable as principal on the notes, or whether the contract was as to her a contract of suretyship.

The evidence in this case is not entirely satisfactory. While it is true that a married woman may bind herself by an executory contract, the consideration of which is personal property purchased by her for her own use, and the ownership of and title to which vests in her, even though such property be contracted for and delivered to another in her behalf, she can not so bind herself when property is purchased, the title to which is to vest in another.

Although the contract in this case was negotiated by R. M. Chandler, he assumed to negotiate on the appellant's behalf, and she subsequently ratified what he did. Butler was informed in the start that the appellant was to become the purchaser. When informed of what had taken place, the appellant said it was satisfactory. When told that the sale was being made to her, she did not dissent, but replied that she was starting her nephew in business, that she was purchasing the property for him.

Taking the whole evidence together, the court may have inferred that although the purchase was made to start the

McLain v. Draper.

minor in business, the appellant retained the title and ownership in herself.

The property was taken into and kept in her barn, and was in a sense in her possession, and used in connection with her business.

There is also evidence from which it may be inferred that she was regarded as the owner, notwithstanding the supervision of the property and the letting of it were in a measure entrusted to her nephew.

While conceding that the evidence is meager and unsatisfactory as it appears in the record, we can not say that the finding of the court is without any support.

The judgment is affirmed with costs.

Filed Feb. 23, 1887.

No. 12,761.

McLAIN v. DRAPER.

ATTACHMENT.—Dismissal.—Rights of Third Persons.—The parties to an attachment proceeding can not dismiss the cause during term, so as to affect the rights of third persons, without an order of court.

From the Decatur Circuit Court.

J. D. Miller and *F. E. Gavin*, for appellant.

S. B. Eward, *W. A. Moore* and *J. O. Marshall*, for appellee.

ELLIOTT, J.—On the 5th day of September, 1884, Marion Meredith instituted proceedings in attachment against George B. Draper, and on the 18th day of November, of that year, the cause was called, and a rule to answer was taken by Meredith. On the forenoon of that day, the attorney of Draper delivered to Meredith's attorney a check for the amount of his claim, which was accepted as payment.

McLain v. Draper.

At the time the check was delivered, the deputy clerk was informed that the cause was dismissed, and this announcement was made "in the court-room, but was not addressed to the court nor heard by the judge, and no order or direction of dismissal was made by the court." An entry of dismissal was, however, made by the clerk on the docket. This entry was made without the order of the court, and was afterwards erased by its order. Before noon of the same day, Martha McLain, the appellant, filed her complaint, affidavit and bond in attachment with the clerk, and called the attention of the court to their filing. The court caused the case to be noted on the docket as filed under the original action instituted by Meredith. Neither the appellant nor her attorneys knew of the attempted dismissal of that action, nor did the court have any knowledge of it. Two or three minutes after the appellant filed her papers under the original action, and after the filing had been noted on the docket, Draper's attorney was notified of these facts, and he thereupon notified the court of the "agreement of dismissal." On the afternoon of the same day, the docket was again called, and upon this call the attorney of Meredith announced to the court the dismissal of the original action, and an entry of dismissal was then made by the court. These facts are exhibited in a special finding made by the court on the request of the parties, and upon them the court stated the following conclusion of law: "The original suit of Meredith against Draper had been dismissed by the plaintiff before the institution of the attachment proceedings of said McLain." We think that the court erred.

It has been held by courts of high authority, that a dismissal is not effective until it has been passed upon by the court. *Carleton v. Darcy*, 75 N. Y. 375; *Averill v. Patterson*, 10 N. Y. 500; *Bishop v. Bishop*, 7 Rob. (N. Y.) 194; 2 Wait Pr. 603.

While the question seems not to have been expressly decided by this court, yet the language used in some of the

McLain v. Draper.

decisions clearly implies that a dismissal in term time is not effective until ordered or approved by the court. *Breese v. Allen*, 12 Ind. 426; *Wiseman v. Lynn*, 39 Ind. 250; *Livergood v. Rhoades*, 20 Ind. 411.

It is true that it was held in *St. John v. Hardwick*, 17 Ind. 180, that a written agreement of dismissal filed with the clerk in vacation is effective without any order of the court, but that case rests solely upon a statutory provision which is not at all applicable to a dismissal made during term time. We need not, however, go as far as the cases first cited by us do, for it is sufficient for us to declare that where the parties know, as matter of law, that third persons may acquire rights under a pending action, it can not be dismissed during term, so as to affect the rights of those parties, without an order of court. *Ryan v. Burkam*, 42 Ind. 507. If the third person had notice of the agreement to dismiss, it is possible that the order of the court subsequently entered confirming the dismissal would bind him, but that is not the case here, for the third person had no notice of the agreement to dismiss. To permit a plaintiff in the original action to dismiss during term time, "of," as FOLGER, J., says, in *Carleton v. Darcy*, *supra*, "his own head," would make the way easy to grave abuses and great injustice in cases where the rights of third persons may be affected.

Judgment reversed, with instructions to re-state the conclusion of law and enter judgment thereon for the appellant on the issue joined.

Filed Oct. 28, 1886; petition for a rehearing overruled Feb. 18, 1887.

The School Township of Allen v. The School Town of Macy.

No. 12,994.

THE SCHOOL TOWNSHIP OF ALLEN v. THE SCHOOL TOWN OF MACY.

COMMON SCHOOLS.—*School Property.—Trusteeship.*—Under the Constitution and laws of this State, public school property is held in trust for school purposes by the persons or corporations authorized to control it, and the Legislature may, at its pleasure, provide for a change in the trusteeship.

SAME.—*Town.—When Entitled to Conveyance of Township Property.*—When a town is incorporated and organized as a school corporation, it succeeds the school township in which it is situated in all educational matters connected with the public schools within its limits, and the title to school buildings previously erected therein by the township vests in the town, and, under section 4508, R. S. 1881, it is entitled to a conveyance of such property for common school purposes.

From the Miami Circuit Court.

H. J. Shirk, J. Mitchell, R. P. Effinger and R. J. Loveland,
for appellant.

J. M. Brown, N. N. Antrim and D. P. Baldwin, for appellee.

NIBLACK, J.—This was a suit by the School Town of Macy, in the county of Miami, in this State, against the School Township of Allen, in the same county, to quiet the title to, and obtain a conveyance for, a tract of land containing about three acres, and situate within the territorial limits of said town of Macy, upon which a school building had been erected.

The complaint averred that the town of Macy had, at the March term, 1884, of the board of commissioners of said county of Miami, become an incorporated town, and had since so continued to be; that said town had thereafter elected three school trustees as the law required, and had become fully organized as a school corporation; that prior to the incorporation of such town its territorial limits constituted a part of the territory of the township of Allen, which had been divided into nine school districts, in each of which school-houses had been erected at the common expense of all the taxpayers of the township; that said school district No.

109	559
138	144
109	559
143	400
109	559
153	287
109	559
159	427

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one (1) embraced all of the territory of said town of Macy and other contiguous territory; that on the 6th day of May, 1882, the school township of Allen purchased the tract of land in controversy, and afterwards received a conveyance therefor; that during the year 1883 a school-house was erected on said tract of land for the use of said school district No. one (1), which had since been exclusively used by the citizens of such district for school purposes; that all the inhabitants of the remaining territory of said school district No. one (1) had been attached to said school town of Macy for educational purposes, and had become entitled to participate, and were in fact participating, in the use of said school-house and grounds thereto attached; that there was no other public school-house remaining either in said school town of Macy or within said school district No. one (1); that the said school township of Allen was claiming the exclusive ownership and control of said school-house and the tract of land on which it is situate, and asserting the right to sell and dispose of such tract of land, with the appurtenances, without the consent of said school town of Macy, and to appropriate the proceeds thereof to the use of such school township. Wherefore the said school town of Macy asked that its title to said tract of land, with the school-house situate thereon, be quieted, and that said school township be required to convey said tract of land to it, the said school town, for school purposes.

A demurrer to the complaint being first overruled, the school township answered, admitting, either expressly or impliedly, the material allegations of the complaint, but averring that the tract of land described in the complaint was purchased at a cost of \$250, which was paid out of the special school revenue belonging to the township; that during the year 1883, the school township erected on the tract of land in question a large brick school building, at a cost of \$5,000; that \$2,000 of said sum was paid out of the special school revenue of the township; that the remaining \$3,000

The School Township of Allen v. The School Town of Macy.

was obtained by borrowing that sum from one Charles H. Brownell on the credit and notes of the township as a school corporation ; that thereafter such township had complete possession and control of said school building until the said town of Macy was incorporated, after which the school trustees of said town forcibly took possession of said building, and had ever since continued in such possession without right.

The school township also filed a cross complaint in two paragraphs, each substantially setting up the same facts. The first paragraph demanded possession of the school building and grounds, and the second prayed that, in the event that the title to such building and grounds should be decreed to be in the said school town, the same should be subject to the payment of the amount due to the said Charles H. Brownell as above stated.

Demurrers were severally sustained to the answer, and to both paragraphs of the cross complaint, and the school township refusing to answer further, judgment was rendered against it upon demurrer, and a commissioner was appointed to convey the tract of land in dispute to the school town of Macy.

When the town of Macy was incorporated, and was organized as a school corporation, it became the successor of the school township of Allen in all educational matters connected with the public schools within its territorial limits, and, as a necessary consequence, the jurisdiction which such school township had theretofore exercised within such territorial limits was thereafter entirely excluded.

"There *can not be*, at the same time, *within the same territory, two distinct municipal corporations*, exercising the same powers, jurisdictions, and privileges." Dillon Munic. Corp. (3d ed.), section 184.

An incorporated town is as much a distinct municipal corporation for school purposes as is a civil township. Section 4438, R. S. 1881. It is, also, now a well recognized legal

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inference, deducible as well from general principles as from the decided cases, that, under the Constitution and laws of this State, public school property is held in trust for school purposes by the persons or corporations authorized for the time being to control such property, and that it is in the power of the Legislature to provide for a change in the trusteeship of such property in certain contingencies, presumably requiring such a change, or, indeed, to change the trustee of that class of property whenever it may choose to do so.

It was held in the case of *School District No. 1 v. Richardson*, 23 Pick. 62, that when a township abolishes its existing school districts and forms new districts, the titles to the school houses then in existence vest in the new districts within whose territory they happen to fall. This case was followed by, and there was substantially the same holding in, the case of *School District No. 6 v. Tupley*, 1 Allen, 49, and the correctness of the conclusions reached in those cases has been either expressly or impliedly recognized by the cases of *Carson v. State*, 27 Ind. 465, *State, ex rel., v. Shields*, 56 Ind. 521, and *School Town of Leesburgh v. Plain School Township*, 86 Ind. 582. These conclusions were in accordance with the general principles governing the use, occupation and control of public property situate within territory which has been transferred to a new governmental jurisdiction, and apply as well to new school corporations created by the incorporation of towns and cities, as to school corporations formed by civil townships, or by school districts wherever they are made to constitute distinct and independent school corporations, as they are in many of the States.

Section 4508, R. S. 1881, provides that "The title to all lands acquired for school purposes shall be conveyed to the township, incorporated town, or city for which it is acquired, in the corporate name of such township, town, or city, which is used for school purposes, for the use of common schools therein. In all cases in which the title to any such land is

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vested in any other person or corporation than as above provided, it shall be the duty of the trustee for school purposes of the township, town, or city to procure the title to be vested as in this section provided."

Under the provisions of this section of the statute, and upon the facts stated in the complaint, the school town of Macy was, as we believe, entitled to a conveyance to it of the tract of land and school building in question, to be held and used by it for common school purposes, and, in that view, the circuit court did not err either in overruling the demurrer to the complaint, or in sustaining demurrers to the answer and cross complaint.

The only cases to which our attention has been directed, which are in seeming conflict with the conclusion reached in this case, are *Heizer v. Yohn*, 37 Ind. 415, and *Reckert v. City of Peru*, 60 Ind. 473.

But neither one of those cases involved the precise question presented in this case. In each of those cases the title had been permitted to remain in the township which had purchased the land and erected a school-house upon it, and in each the proceeding was for an injunction to restrain the township trustee from selling or otherwise disposing of the land and school-house, to the prejudice of the corporation within whose limits they had fallen by an extension of its boundaries.

If, in those cases, conveyances to the school city corporations had been demanded, a different question from that respectively decided by each of them would have arisen, and they would then have been, in principle as well as in their facts, similar to the case before us.

Whether the school town of Macy might be made directly responsible for any part or proportion of the debt incurred for the erection of the school building in litigation in this case, and, if so, in what manner and under what circumstances, are questions not separately and distinctly raised by the plead-

Dill *et al.* v. Lawrence.

ings, and concerning which we, for that reason, neither express nor intimate any opinion. On that subject, see Dillon Munic. Corp., sections 186 to 189, both inclusive.

The judgment is affirmed, with costs.

Filed Feb. 24, 1887.

109	564
127	568
109	564
137	360
109	564
145	673

No. 12,727.

DILL ET AL. v. LAWRENCE.

PRACTICE.—Misconduct of Juror.—Hearing on Affidavits.—Supreme Court.—Where a question as to the misconduct of a juror is presented by affidavits and counter-affidavits, the decision of the trial court thereon will not be disturbed on appeal.

PRINCIPAL AND SURETY.—Bond for Performance of Work.—Damages.—Penalty.—The sureties in a bond given to secure the performance of work undertaken by their principal are liable for the actual damages sustained by the obligee, but not for a penalty which the principal separately agrees to forfeit in case he fails to perform the work as stipulated.

SAME.—Liquidated Damages.—The law ordinarily regards a general sum stated in a bond as a penalty, and will allow a recovery only for actual damages. If the sum is fixed as liquidated damages it must so appear, either from the intent of the parties as expressed in the entire instrument, or from express words.

From the Huntington Circuit Court.

B. M. Cobb and *C. W. Watkins*, for appellants.

J. C. Branyan, *M. L. Spencer*, *R. A. Kaufman* and *W. A. Branyan*, for appellee.

ELLIOTT, C. J.—The appellants charged one of the jurors who tried the case with misconduct, and filed affidavits in support of their charge. Counter affidavits were filed by the appellee, and the issue of fact thus presented was decided adversely to the appellants.

A settled rule forbids us to disturb that decision. *Doles v. State*, 97 Ind. 555, and cases cited; *Luck v. State*, 96 Ind.

Dill *et al.* v. Lawrence.

16; *Shields v. State*, 95 Ind. 299; *Catterlin v. City of Frankfort*, 87 Ind. 45; *Elliott v. State*, 73 Ind. 10.

The complaint is on a bond executed by the appellants to secure the performance of work undertaken by one of them, Jacob Dill, and reads thus: "Know all men by these presents, that we, George W. Sloan and John W. Luckey, of Huntington county and State of Indiana, are held and firmly bound to Philip Lawrence in the sum of six hundred dollars, for the payment of which we do jointly and severally bind ourselves in the following condition of this obligation, for that: Whereas, Jacob Dill has taken a job of ditching of Philip Lawrence (see contract on first page), to be fully completed by the 31st day of October, 1882: Now, if said Jacob Dill shall faithfully do and finish said ditch against the above date, then this bond to be void, otherwise in full force." In the contract referred to in this bond is the following stipulation: "I, Jacob Dill, of the second part, agree to take and do the work to completion on the above named ditch against the 31st day of October, 1882, according to the above described and specified articles and specifications therein, or I will forfeit one hundred dollars thereon."

The bond is clumsily drawn, and, like most instruments prepared by unskilled persons, is, in many respects, obscure and confused, but we think it is quite clear that the sureties do not undertake to pay the penalty specified in the contract between Dill and Lawrence.

The terms used in stating the contingency in which Dill shall pay one hundred dollars, constitute the stipulation a penalty, and it can not, therefore, be regarded as an agreement that the sum specified shall be taken as a provision for liquidated damages. The word "forfeit" very clearly shows, as does the entire theory of the contract, that the one hundred dollars was stated as a penalty. *Carpenter v. Lockhart*, 1 Ind. 434; *Hamilton v. Overton*, 6 Blackf. 206.

We do not doubt that parties may by agreement fix upon

Dill *et al.* v. Lawrence.

a certain sum as liquidated damages; but, where the sum is so fixed, it must appear either from the intent of the parties as expressed in the entire instrument, or from express words, that the sum was fixed as liquidated damages. The law ordinarily regards a general sum stated in a bond as a penalty, and will allow only a recovery of the damages actually sustained. *Prima facie*, the sum stated is a mere penalty. *Shute v. Taylor*, 5 Met. 61; *Wallis v. Carpenter*, 13 Allen, 19; *Cheddick v. Marsh*, 21 N. J. L. 463; *Baird v. Tolliver*, 6 Humph. 186; *Spear v. Smith*, 1 Denio, 464; 3 Parsons Contracts, 156.

It is doubtful whether more than a nominal recovery could be had against Dill for failure to complete the work within the time specified, without evidence of actual damages; but however that may be, it is clear that no recovery can be had against the sureties for more than the actual damages resulting from a breach of the contract. The reason for this conclusion is obvious. They have not undertaken to pay any penalty; their undertaking was that Dill should complete the work by the 31st day of October, 1882. They did not undertake to pay any penalty that he might forfeit, and, as they occupy the favored position of sureties, their contract can not be extended by construction or implication. If Dill did not complete his contract at the time stipulated, they are liable for the damages sustained, but not for the penalty their principal agreed to forfeit.

The reference made by the bond to the contract between Dill and Lawrence was for the purpose of indicating the work which he was to do, and may be looked to for the purpose of determining the scope of the undertaking of the sureties, but it can not control the undertaking so clearly expressed in the bond executed by them as to impose upon them a liability for the penalty which their principal agreed to forfeit in case he failed to perform the work within the time stipulated in his contract.

Fleetwood v. Brown.

The court erred in instructing the jury that they might assess the penalty against the appellants.

Judgment reversed.

Filed Feb. 19, 1887.

No. 12,834.

FLEETWOOD v. BROWN.

109	567
136	569
109	567
137	394
109	567
147	700

PROMISSORY NOTE.—*Consideration.*—*Conveyance.*—*Failure of Title.*—*Quitclaim Deed.*—*Mutual Mistake of Fact.*—*Estate of Absentee.*—A father abandoned his family and property and left the State, his whereabouts being unknown to them for six years. Five years after his disappearance, both believing him to be dead, a daughter conveyed to a brother, by quitclaim deed, her interest in the real estate, the latter paying a part of the consideration in money and giving his promissory note for the balance. The father subsequently returned, excluded his son from possession of the land, and sold it. Action by the daughter on the note, and an answer by the defendant setting up the facts, and tendering a deed to the land conveyed.

Held, that the answer states a good defence.

SUPREME COURT.—*Rehearing.*—*Practice.*—Questions not presented and discussed on the original hearing of a cause will not be considered on petition for a rehearing.

SAME.—*Pleading.*—*Evidence.*—*Harmless Error.*—The Supreme Court will not look to the evidence to determine whether or not the sustaining of a demurrer to a good paragraph of answer was a harmless error.

From the Jackson Circuit Court.

W. K. Marshall and *J. B. Brown*, for appellant.

B. H. Burrell, *J. F. Applewhite* and *R. A. Applewhite*, for appellee.

ZOLLARS, J.—This action is by appellee upon a promissory note, executed by appellant. The first alleged error, argued by appellant, is the sustaining of a demurrer to the second paragraph of his answer. That paragraph may be summarized as follows:

Fleetwood v. Brown.

In 1879, Jesse Fleetwood, the father of the parties hereto, was the owner of two hundred and forty acres of land in Jackson county, and was a resident of that county, where also his wife and children, including the parties hereto, resided, and have still resided. In that year, Jesse Fleetwood abandoned his family and property and left the State, and his whereabouts was unknown to the parties hereto, and to the other members of his family, until he returned in June, 1885. Upon his return, he took possession of his lands, excluding others therefrom, and afterwards sold the lands. In September, 1884, at the time the note in suit was executed, for a long time prior thereto, and afterwards, until his return in June, 1885, the parties hereto, and the balance of the family supposed and believed that he was dead. After his departure, and before the note in suit was executed, his wife, the mother of these parties, died. If he had been dead, as supposed, appellee, as one of his heirs, would have been the owner of the undivided one-eleventh part in value of the lands. Acting upon the belief that he was dead, and that she was, therefore, such owner, she sold that interest to appellant, and executed to him a quitclaim deed, without covenants of warranty. He paid a small part of the agreed purchase-price in cash, and gave his note, being that in suit, for the balance. Jesse Fleetwood had no knowledge that such a deed had been executed until after his return, never recognized it as of any force, and, as already stated, took possession of the lands, excluded appellant therefrom, and sold them.

It is alleged that the supposed death of Jesse Fleetwood was the controlling fact that induced the sale and purchase; that if the parties had known that he was alive, appellee would not have sold, or attempted to sell, any supposed interest in the lands, and appellant would not have purchased, or given the note; that the whole transaction, including the execution of the note, was the result of a mutual mistake of

Fleetwood v. Brown.

fact, and that, therefore, as appellant got nothing, appellee should not be allowed to collect the note.

Appellant, with the answer, tendered a quitclaim deed to appellee, for the interest described in her deed to him.

It seems to us that this paragraph of answer makes a clear case of a mutual mistake of fact, and a mistake as to a fact that underlies the whole transaction. Had Jesse Fleetwood been dead, appellee would have owned an interest in his lands, which she might have conveyed so as to transfer to her grantee a thing of value. As it was, she owned no interest at all in the lands that she could convey; she parted with nothing by the attempted conveyance, and appellant got absolutely nothing for the cash he paid and the note in suit.

The deed executed by appellee, as we have seen, was a quitclaim, without covenants of warranty, but we are unable to understand how that fact can deprive appellant of the defence set up in the answer under consideration. The defence is not based upon the deed, but upon a fact back of it—upon the mutual mistake of the parties which led to its execution, and to the execution of the note. But for that mistake, neither instrument would have been executed. The mistake was thus in relation to a material fact. That appellant was mistaken as to that fact, was not the result of any negligence on his part.

Jesse Fleetwood had been absent and unheard of for such a length of time that for some purposes he was presumed to be dead. R. S. 1881, section 2232, *et seq.*; Acts 1883, p. 209.

In any event, the parties were not negligent in believing him to be dead, and in acting upon that belief. We feel quite secure in holding, that upon the facts set up in the answer, which the demurrer admits are true, appellant should not be compelled to pay the note.

Judge Story, in his work on Equity Jurisprudence, at section 140 of volume 1, says: "The general rule is, that an act done or a contract made under a mistake or ignorance of a material fact is voidable and relievable in equity." In section

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141 of the same volume of the work, he gives the following example: "A. buys an estate of B., to which the latter is supposed to have an unquestionable title. It turns out upon due investigation of the facts, unknown at the time to both parties, that B. has no title (as if there be a nearer heir than B., who was supposed to be dead, but is in fact living); in such a case equity would relieve the purchaser and rescind the contract."

Another example of the application of the rule is given in section 143a, as follows: "So if a horse should be purchased, which is by both parties believed to be alive, but is at the time of the purchase in fact dead, the purchaser would upon the same ground be relieved by rescinding the contract if the money was not paid, and if paid, by decreeing the money to be paid back."

The doctrine of this learned author, as contained in the sections cited and in other sections, and our conclusion in this case, are fully sustained by our own cases. *Lewellen v. Garrett*, 58 Ind. 442 (26 Am. R. 74); *Brown v. College Corner, etc., G. R. Co.*, 56 Ind. 110; *Worley v. Moore*, 97 Ind. 15; *Solinger v. Jewett*, 25 Ind. 479.

Counsel for appellee cite the cases of *Shuler v. Hardin*, 25 Ind. 386, and *Atherton v. Toney*, 43 Ind. 211.

The latter case was one where a party purchased an equity of redemption, received a quitclaim deed, and executed his note for the purchase-money. He bought an outstanding mortgage, and undertook to set it off against his note given for the land. It was held, that in the absence of a special contract, or without some special circumstances, the purchaser should be held to have taken the land charged with the encumbrance; that to hold otherwise would be inequitable, as it would enable the purchaser to take from the vendor the equity of redemption, without paying him therefor. The case of *Shuler v. Hardin*, *supra*, is similar.

Manifestly, those cases are so different from that before us, that the rulings there are not controlling here, as against

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appellant's answer. Those cases were correctly decided, upon principles of equity, and there is nothing in the decisions that in any way conflicts with our conclusions in this case; indeed, the principles of equity which underlie the decisions there made require the ruling we make here.

It results from what has been said, that the court below erred in sustaining the demurrer to the second paragraph of appellant's answer.

Judgment reversed, with costs, and cause remanded, with instructions to the court below to overrule the demurrer to that paragraph of answer.

Filed Nov. 20, 1886.

ON PETITION FOR A REHEARING.

ZOLLARS, J.—Whatever appellee is entitled to under the law should be freely awarded to her by the courts, but there is certainly nothing in her case, if the facts stated in the second paragraph of appellant's answer are true as admitted by the demurrer, calculated to excite a great degree of zeal and emphasis on the part of counsel, nor to require "haste" on the part of the courts to strain the law in order that she may recover.

The second paragraph of appellant's answer shows that the parties are brother and sister. It is averred in that answer, that the note in suit was the result of a mutual mistake of fact, and that for it appellant received absolutely nothing. Admitting that to be true, as appellee did by her demurrer, she yet insisted and still insists that she should recover the amount of the note.

Her counsel again contend, that the court below did not err in sustaining the demurrer to that paragraph of the answer, and for the first time insist that, if it did, the error was a harmless one.

It has long been the settled practice of this court, that questions not presented and discussed upon the original hearing, will not be noticed upon a petition for a rehearing.

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2 Works Pr., section 1116, and cases there cited. Not only was it not claimed upon the original hearing, that the error, if any, was harmless because the facts set up in the second paragraph might have been proven under other paragraphs of the answer, but the case was submitted upon the theory that the several paragraphs set up separate and distinct defences. Notwithstanding that, we examined the record to ascertain whether or not there was any other paragraph of answer under which the facts set up in the second paragraph might have been proven. We concluded then, and have no hesitation in holding now, that there was not. The second paragraph was the only answer setting up the mutual mistake of the parties. It was held in the opinion delivered upon the hearing, that the second paragraph of the answer was good, and that hence the court below erred in sustaining the demurrer thereto. Further investigation and reflection have strengthened our convictions in that regard.

It can not be said that the error was a harmless one. It is settled in this State, that the sustaining of a demurrer to a good paragraph of an answer will be a harmless error, if the defendant has another paragraph under which the same matters are admissible in evidence. So it was held in the cases of *Mason v. Mason*, 102 Ind. 38, *McGee v. Robbins*, 58 Ind. 463, *Johnson v. Putnam*, 95 Ind. 57, *Moore v. Boyd*, 95 Ind. 134, *Epperson v. Hostetter*, 95 Ind. 583, *Luntz v. Greve*, 102 Ind. 173, and *Landwerlen v. Wheeler*, 106 Ind. 523, now cited by counsel.

Such, however, is not the case before us. Here, as we have seen, there was no other paragraph of answer under which the facts set up in the second paragraph were admissible in evidence.

It is further claimed that the judgment is right upon the evidence, and that, therefore, the error in sustaining the demurrer to the second paragraph of the answer should be regarded and treated as a harmless error. In support of that contention, are cited the cases of *Campbell v. Nebeker*, 58

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Ind. 446, *Layman v. Shultz*, 60 Ind. 541 (547), *Gallagher v. Himelberger*, 57 Ind. 63, and *Landwerlen v. Wheeler*; *supra*.

In the first three cases, the errors complained of arose in the trial of the causes, and not in the overruling of demurrers to good paragraphs of answers. The case last cited announces the well settled rule, that the sustaining of a demurrer to a good paragraph of an answer will be regarded as a harmless error if there is another paragraph under which the same facts may be proven. It was not therein held, or intended to be held, that this court may look to the evidence to ascertain whether or not the sustaining of a demurrer to a good paragraph of an answer was a harmless error. It has never been so held by this court. On the contrary, the holding has been, that in such a case, the evidence is not to be looked to for the purpose of discovering whether the ruling did or did not do harm. The rule, and the reason of it, are fully stated in the case of *Wilson v. Town of Monticello*, 85 Ind. 10. The sustaining of a demurrer to a good paragraph of an answer, when there is no other paragraph under which the same facts may be proven, is, in effect, a decision by the court that the facts thus set up do not constitute a defence, and are not admissible in evidence. And although the record might show that some such facts as those specially pleaded were admitted in evidence, this court has no way of knowing that other facts in support of the plea might not have been brought forward by way of evidence, had the court not ruled the plea insufficient as a defence. See, also, *Pennsylvania Co. v. Poor*, 103 Ind. 553; *Pennsylvania Co. v. Marion*, 104 Ind. 239.

It was claimed upon the submission of the cause, and is now claimed in the petition for a rehearing, that because the deed from appellee to appellant was a quitclaim deed, without covenants, appellant can not defend against the note. In support of that contention appellee's counsel cite *Oiler v. Gard*, 23 Ind. 212, *Shuler v. Hardin*, 25 Ind. 386, *Shumaker v. Johnson*, 35 Ind. 33, *Headrick v. Wisheart*, 41 Ind. 87,

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Atherton v. Toney, 43 Ind. 211, *Jones v. Noe*, 71 Ind. 368, *Beal v. Beal*, 79 Ind. 280, and *Axtel v. Chase*, 83 Ind. 546, and claim that if the holding in the principal opinion is correct, they should be overruled, as it is in conflict with them.

In the principal opinion we showed the difference between this case and the cases of *Shuler v. Hardin*, *supra*, and *Atherton v. Toney*, *supra*. Those cases need be no further noticed.

The holding in the case of *Oiler v. Gard*, *supra*, was, that mistake or ignorance forms no ground of relief from contracts fairly entered into with full knowledge of the facts, etc.

In the case before us, the parties did not have full knowledge of the facts. As stated in the answer, they acted upon the assumption that Jesse Fleetwood, the owner of the land, was dead. In that they were mutually mistaken.

In the case of *Shumaker v. Johnson*, *supra*, there was no mistake of fact, and hence that case is not authority in any way in conflict with our holding here.

And so, in the case of *Headrick v. Wisheart*, *supra*, there was no question as to any mistake of facts. It was held that the grantor in a quitclaim deed could not be held upon a verbal promise to pay back taxes.

In *Jones v. Noe*, *supra*, the question arose under a warranty deed. It was held that the vendee could not successfully resist the payment of a note for the purchase-money, or recover more than nominal damages, while he retained possession of the land, and had suffered no inconvenience or expense by reason of the vendor's want of title. That holding was correct, and rested upon the reason that underlies all such cases, and that is, the possibility of the possession ripening into title. *Small v. Reeves*, 14 Ind. 163.

In the case before us, appellant was not in the possession of the land, but had surrendered the possession to the rightful owner, as he had a right to do under the ruling in the case of *Axtel v. Chase*, 83 Ind. 546 (558), cited by counsel.

There is nothing in any of the cases cited by counsel at all in conflict with what we here hold.

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In the case of *Dodge v. Briggs*, 27 Fed. R. 160 (167), cited by counsel, it was said that a person accepting a quitclaim deed is chargeable with notice of such invalidity of the grantor's title, as he might have ascertained by inquiry. Here appellant had no way by which he could learn that the father was still living; no one knew that, or had any way of knowing it, until he returned.

We adhere to our former ruling, and overrule the petition for a rehearing.

Filed April 28, 1887.

100	575
120	438
100	575
144	174

No. 13,020.

SINGER ET AL. v. SCHEIBLE ET AL.

NOTICE.—*Commissioner's Deed.*—*Recitals.*—*Inquiry.*—*Mortgage.*—*Outstanding Equities.*—*Partition.*—The deed of a commissioner in partition, which gives the title of the cause and recites that it is made in pursuance of an order and judgment of court therein, "entered in Record No. 11, of the records of said court, on page 381," is sufficient to put subsequent purchasers or mortgagees from the grantee upon inquiry as to the character, extent and contents of the order and judgment, and as to all matters affecting his title which such record would disclose, and with respect to equities in favor of third persons, which might thus have been discovered, they can not be deemed innocent purchasers.

From the Bartholomew Circuit Court.

S. Stansifer, for appellants.

W. F. Norton, S. W. Smith and G. W. Cooper, for appellees.

Howk, J.—In this case, the appellants John F., Jacob H. and Clara Singer sued Miranda J. and Della T. Singer, and the appellees Catharine Scheible and James C. Laughlin, auditor, and the board of commissioners of Bartholomew county, in a complaint of two paragraphs. The object of appellants' suit, as stated in each paragraph of complaint,

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was to quiet their title to certain real estate, particularly described, in Bartholomew county. The demurrer of appellee Laughlin, county auditor, and the county board, was sustained as to each paragraph of complaint. The demurrer of Catharine Scheible was overruled as to the first paragraph, and sustained as to the second paragraph, of appellants' complaint. Mrs. Scheible then filed a cross complaint, wherein she sought the foreclosure of a certain mortgage held by her on the same real estate described in appellants' complaint. To such cross complaint appellants answered in three paragraphs, whereof the first was a plea of payment; in the second paragraph, they stated substantially the same facts that were stated in the first paragraph of their complaint; and in the third paragraph of their answer, they set up the same matters as those alleged in the second paragraph of their complaint. The demurrer of Mrs. Scheible was overruled as to the second paragraph and sustained as to the third paragraph of such answer; and she replied to the first and second paragraphs of answer, and answered the first paragraph of complaint, by general denials thereof.

The cause was submitted to the court for final hearing upon the complaint and cross complaint, and the issues joined thereon and the evidence adduced by the parties respectively; and, as against Miranda J. and Della T. Singer, the court found and decreed that appellants were the absolute owners of the real estate, described in their complaint. Upon the issues joined on the first paragraph of complaint by Catharine Scheible, and on her cross complaint, the court found against appellants and in favor of Mrs. Scheible, and decreed the foreclosure of her mortgage and the sale of the mortgaged real estate; and that the lien of such mortgage was prior and superior to the claims and equities of appellants in and to such real estate.

The first error complained of here by appellants is the sustaining of the demurrer of Catharine Scheible to the second paragraph of their complaint.

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In this paragraph, appellants alleged that, on the — day of —, 186—, Jacob Snyder died intestate, the owner in fee simple of the following real estate in Bartholomew county, Indiana, to wit: The south half of the southeast quarter of section 31, in township 10 north, of range 5 east, and the north half of the northeast quarter of section 6, in township 9 north, of range 5 east, and other real estate in such county, and also personal property of the value of \$12,000, leaving the following children and grandchildren (and no widow) as his only heirs at law, to wit, Reuben, John F., Simon and Jacob Snyder, Ann E., wife of John Loudon, Sarah, wife of Thomas King, Mary E. and Laura Treadway, infant children of his deceased daughter, — Treadway, and the appellants, infant children of Catharine Singer, another deceased daughter of Jacob Snyder, deceased; that thereafter said children and grandchildren, other than Jacob Snyder, Jr., instituted an action in the court of common pleas of Bartholomew county, against Jacob Snyder, Jr., for the partition of such real estate, wherein such proceedings were had as resulted in an order of such court for the sale of portions of the decedent's lands, including the real estate particularly described as aforesaid, and Simeon Stansifer was appointed and duly qualified as commissioner to make such sale; that in such action and proceedings, appellants being then infants, Richard H. Singer, their father and guardian, duly appointed by the proper court of Pulaski county, Indiana, and qualified, appeared with and for them, and Milton Treadway, guardian of Mary E. and Laura Treadway, infants, duly appointed by the proper court and qualified, appeared with and for them; and that the other parties to such partition suit, with the husbands of the decedent's daughters, were all over the age of twenty-one years, and the husbands joined with their wives in such proceedings.

And appellants further said, that, after the order of sale and the appointment of such commissioner, the parties to

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such suit appeared in such court of common pleas, on November 26th, 1869, and submitted to the court an agreement in writing, which was then and there spread of record in the proper order-book of such court; and, omitting the title of such suit, and the signatures of the parties, such agreement reads as follows:

“It is agreed that R. H. Singer may become the purchaser from Simeon Stansifer, commissioner, of all the real estate of which Jacob Snyder died seized, situate in Union township, Bartholomew county, Indiana, described in the complaint herein, for \$6,000,—\$2,000 to be paid on the day of sale, \$2,000 one year from the day of sale, at six per cent., and \$2,000 two years from the day of sale, with like interest; the said Singer is to pay the taxes on said real estate for this year, and is to have the rent on growing crops of wheat sown this year. As guardian of Catharine Singer’s heirs he may deduct as a cash payment, from the first and second payments, the estimated distributive portions of said wards of proceeds of all real estate of said Jacob Snyder, deceased, and of his personal estate. The order directing the sale of said real estate, to be sold at public sale, is to be changed to private sale, without notice or publication thereof. November 12th, 1869.”

And it was averred in appellants’ complaint herein, that the real estate particularly described therein was the only real estate, whereof Jacob Snyder died seized, situate in Union township, in such county. Thereafter, on March 16th, 1870, Simeon Stansifer, Esq., commissioner as aforesaid, submitted to such court of common pleas his verified report in writing of his proceedings, as such commissioner, to the effect, *inter alia*, that pursuant to the agreement of the parties to such partition suit, he was authorized to convey to Richard H. Singer the real estate, particularly described in appellants’ complaint herein, and take from him a mortgage to secure the payment of deferred payments, assigned to parties and heirs therein; that such report was approved and ratified by such

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court, and it was thereon ordered, among other things, that Simeon Stansifer, commissioner as aforesaid, execute to Richard H. Singer a deed of conveyance of the real estate hereinbefore described, purchased by him as aforesaid, and that, before the delivery of such deed, the commissioner take from said Singer a mortgage on such real estate to secure the unpaid balance of purchase-money; and that thereupon, in pursuance of such order, Simeon Stansifer, as such commissioner, submitted to such court of common pleas his deed of conveyance, in the statutory form, of the real estate above described to said Richard H. Singer, which deed was then and there examined and approved by such court, and such approval was endorsed thereon, and, the costs of such suit having been paid, the commissioner aforesaid was discharged from further duty or liability in that behalf; all of which proceedings have since remained of record and in full force, and were in fact had and duly made.

Appellants further averred, that the deed of conveyance, so executed and approved by such court, was duly acknowledged by the commissioner aforesaid, and, with such acknowledgment endorsed thereon, was duly recorded in the proper record-book of the recorder's office of Bartholomew county; that such deed contained a full and correct description of the two half-quarter sections of land hereinbefore described, but the clerk of such court, in copying such deed in the order-book entry, by inadvertence, omitted one eighty-acre tract; that thereafter, and before the delivery of such deed to the grantee therein, the parties to such partition suit agreed among themselves as to the share and portion of appellants in and to the estate, real and personal, of Jacob Snyder, deceased, which was \$2,800, and said Richard H. Singer put that amount, and credited himself therewith, into the purchase-price of such real estate, and after having secured by mortgage and otherwise satisfied the balance of \$3,200 to the other heirs and their assigns, the commissioner delivered such deed to the grantee therein, who caused it to be recorded as aforesaid, on

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the 24th day of February, 1871; that said Richard H. Singer took immediate possession of such real estate upon and under said purchase and deed, getting the rent of the growing wheat as provided in the aforesaid agreement for the sale thereof to him, and continued in such possession, appropriating to himself the rents thereof until his death, and for a period of fifteen years, the reasonable rental value thereof being \$300 per year, and more than enough to reimburse him on account of said \$3,200, and the payment of \$142 hereinafter shown.

And appellants averred, that said Richard H. Singer did not, during his lifetime, as their guardian or otherwise, pay or account to them, or any of them, for any portion of said \$2,800, or of such rents, nor has any one since done so, except that in 1882 he paid appellant John F. Singer, on account, the sum of \$142; that appellant John F. Singer became of lawful age in 1878; that appellant Jacob H. Singer, and appellant Clara Singer, were yet infants; that said Richard H. Singer died intestate in July, 1882, the owner of no real estate, and with none in his name other than the real estate hereinbefore described, his estate being insolvent, and leaving the defendants, Miranda J. Singer, his widow by a second marriage, and Della T. Singer, his infant and only child, by his second wife.

Appellants further said, that on the 20th day of November, 1880, Richard H. Singer and Miranda J., his wife, executed to the State of Indiana, for the use of its common school fund, a mortgage on such real estate to secure the payment of \$1,000 of such fund borrowed by him, which mortgage was on the same day recorded in the proper mortgage record of the recorder's office of such county; that, on the same day, Richard H. Singer and Miranda J., his wife, executed to Jacob M. Scheible a mortgage on such real estate to secure the payment of \$1,000 borrowed by him of said Scheible, which mortgage was recorded in the proper mortgage record of such recorder's office; that thereafter Jacob M. Scheible died testate, and, by his last will, bequeathed all his personal

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estate to his widow, the appellee Catharine Scheible; that there had been no administration of Jacob M. Scheible's estate, and all the debts of such estate had been paid; and appellee Laughlin was auditor of Bartholomew county.

Appellants averred and charged that, by reason of the facts hereinbefore stated, Richard H. Singer took, held and used such real estate as the trustee of appellants, who were then and since the equitable owners thereof, and entitled to its use, income and rents; that by reason of the proceedings of record, as aforesaid, in such court of common pleas of Bartholomew county, the mortgagees aforesaid took their respective mortgages with notice of such trust; that such sum of \$2,800, so as aforesaid put into such real estate by Richard H. Singer, with interest not compounded every two years, would pay or otherwise amount to more than the residue of the land, he having purchased it for more than its value, which had since greatly decreased, so that such real estate was not, when Richard H. Singer died, nor since his death, worth more than, to wit, \$4,000.

Wherefore appellants prayed judgment quieting their title to such real estate, declaring them to be the absolute owners in fee simple of the legal and equitable title thereto, and that such mortgages be set aside and declared to be of no effect as against such real estate. Or, if it should be deemed more equitable to do so, then it was prayed that appellants be decreed to be specialty creditors of Richard H. Singer, with an equitable lien upon such real estate prior and superior to the lien of said mortgages, which were past due; that the court should find and adjudge that there was due appellants the sum of \$2,800, with interest thereon compounded every two years, since March 15th, 1870, the date of the commissioner's deed, less as against John F. Singer the payment to him as aforesaid, and interest thereon; and that such real estate, or so much thereof as may be necessary, be decreed to be sold to pay and satisfy the amount found due the appellants, and they pray for all proper relief.

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The first paragraph of appellants' complaint, in addition to the facts stated in the second paragraph, the substance of which we have given, contained the following averment: "And further, it is averred, said Jacob M. Scheible took his said mortgage with other and actual notice of said trust."

We may well conclude, therefore, as we do, that it was the averment last quoted, which caused the circuit court to overrule the demurrer of Catharine Scheible to the first paragraph of appellants' complaint; and that it was for the want of such an averment in the second paragraph of such complaint, her demurrer thereto was sustained by the court. In neither paragraph of their complaint, did the appellants aver that the proper county officers, charged with the control and management of the common school fund, had actual notice, at the time they took the said mortgage to the State, for the use of its common school fund, of the equitable title or trust estate of appellants in or to the mortgaged real estate; and it was for the want of such an averment, we may well suppose, that the court below sustained the demurrer of the auditor and county board to each and both of such paragraphs of complaint.

In his brief of this cause, appellants' counsel says: "The only question for the consideration of this court is, whether the record in the partition suit, the commissioner's deed to Richard H. Singer referring to such record, was constructive notice to the mortgagees?" It is manifest from our statement of this case, that the question thus propounded by counsel is fairly presented for our decision by the rulings below on the demurrer of the auditor and county board to each paragraph of complaint, on the demurrer of Catharine Scheible to the second paragraph of complaint, on her demurrer to the third paragraph of answer to her cross complaint, and by the errors assigned here upon each of the aforesaid rulings. The commissioner's deed, referred to in the question stated by appellants' counsel, was in the form prescribed by section 1023, R. S. 1881, in force since Octo-

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ber 10th, 1863, for such a deed, and was, in substance, as follows:

"Simeon Stansifer, commissioner, by the order and judgment of the court of common pleas of Bartholomew county, Indiana, in the case of *Reuben Snyder*" (and thirteen other plaintiffs, whose names we omit), "*v. Jacob Snyder, Jr.*, entered in record No. 11, of the records of said court, on page 381, conveys to said Richard H. Singer the following real estate in Bartholomew county, Indiana:" (Description omitted), "for \$6,000. Witness my hand and seal," etc.

The statute requires that the deed shall "describe the kind of record, number of volume, and page," wherein "the order or judgment" is entered, by virtue of which the person named as "a commissioner, appointed by the court," is authorized to execute the particular deed. It is manifest, we think, the law required that a commissioner's deed should contain these recitals and references, to the end that the grantee in such deed, and all persons thereafter interested in the title to the real estate therein described, might readily ascertain from the "record, number of volume and page," all matters there shown affecting such title. We are of opinion that the recitals and references in the commissioner's deed, the substance of which we have given, were sufficient to put any person claiming title by, through or under Richard H. Singer, the grantee in such deed, upon inquiry as to the character, extent and contents of the order and judgment, under and pursuant to which the deed was executed. That which shall be sufficient to put the party upon inquiry, is notice. *Hiern v. Mill*, 13 Ves. 114. "And so it is in all cases where the purchaser can not make out a title but by a deed; which leads him to another fact: the purchaser shall not be a purchaser without notice of that fact, but shall be presumed cognizant of it; for it is *crassa negligentia* that he sought not after it." *Mertins v. Jolliffe*, Ambl. 311, 314. See, also, *Brush v. Ware*, 15 Peters, 93, 104; *Coy v. Coy*, 15 Minn. 119; *Wood v. Krebbs*, 30 Gratt. 708; *Cordova v. Hood*, 17

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Wall. 1; *Dickinson v. Worthington*, 4 Hughes C. C. 430; *Lovejoy v. Raymond*, 58 Vt. 509.

In *State, ex rel., v. Davis*, 96 Ind. 539, the court said: "It is well settled that the purchaser of real estate is presumed to have examined the records of the deeds, necessary to make out his chain of title, and under which he claims, and is bound by the recitals in such deeds showing encumbrances, or the non-payment of purchase-money. He is charged with constructive notice of facts recited in a deed under which he claims, and is bound by such facts, even though he have no actual notice thereof." *Wiseman v. Hutchinson*, 20 Ind. 40; *Croskey v. Chapman*, 26 Ind. 333; *Colman v. Watson*, 54 Ind. 65; *Hazlett v. Sinclair*, 76 Ind. 488 (40 Am. R. 254); *Sample v. Cochran*, 84 Ind. 594; *Stockwell v. State, ex rel.*, 101 Ind. 1, on p. 13, *et seq.*

In the case in hand, the mortgagees, or those representing them, claimed that they were purchasers for value, without notice, of the real estate in controversy; and this claim was virtually sustained by the court below, by its rulings upon the separate demurrers of the county auditor and board of commissioners of Bartholomew county to each paragraph of appellants' complaint, and upon the separate demurrers of Catharine Scheible to the second paragraph of such complaint, and to the third paragraph of appellants' answer to Catharine Scheible's cross complaint.

These rulings are in direct contravention of the rules and principles of equitable jurisprudence, and can not be sustained. The mortgagees took their mortgages from Richard H. Singer, upon the real estate described in the deed to him from Simeon Stansifer, commissioner. This commissioner's deed was the only muniment of Singer's title to such real estate. The mortgagees are conclusively presumed to have examined the record of such commissioner's deed, if not the deed itself, under which alone the mortgagor claimed title to the mortgaged property. The recitals and references in such deed, in relation to the order and judgment of the court un-

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der which it was executed, were amply sufficient to put the mortgagees upon inquiry as to all matters affecting the mortgagor's title, which were or might be shown by the record of such order and judgment. They were charged, therefore, with constructive notice of all such matters, and were bound thereby, even though they had no actual notice thereof.

A slight examination of such record would have disclosed the fact, that of the appellants' money, which they did not acquire by or from Richard H. Singer, and in which he had no possible interest, the sum of \$2,800, being seven-fifteenths, or nearly one-half, of the entire purchase-money, was invested by him in the real estate conveyed to him by Stansifer, commissioner. A few inquiries, in the proper quarter, would have developed the further fact, that no part of the sum of money, so invested by Richard H. Singer, had ever been refunded by him or by any one for him to the appellants, or either of them. So it is, therefore, in the case under consideration, the mortgagees could not be purchasers without notice of the foregoing facts, but must be presumed cognizant of them, for it was *crassa negligentia* that they sought not after them.

We are of opinion, therefore, that the court below erred in sustaining the separate demurrers of the county auditor and county board to each paragraph of appellants' complaint, and in sustaining the separate demurrers of Catharine Scheible to the second paragraph of such complaint, and to the third paragraph of appellants' answer to Catharine Scheible's cross complaint.

The judgment is reversed, with costs, and the cause is remanded, with instructions to overrule all the demurrers mentioned in the last preceding sentence, and for further proceedings not inconsistent with this opinion.

Filed Feb. 24, 1887.

 Parish v. Kaspare.

No. 11,771.

PARISH v. KASPARE.

EASEMENT.—Naked License.—Revocation.—A mere naked license to pass over the lands of the licensor is revocable at the pleasure of the latter.

SAME.—Prescription.—Claim of Right.—There can be no title by prescription where the user is not under claim of right.

SAME.—User for Twenty Years.—Where there is an uninterrupted user of a way for twenty years, under claim of title, an easement therein is established, even though the original claim was not well founded.

SAME.—Appurtenant Way.—Where the owner of land annexes to part of it a right of way as appurtenant thereto, and then conveys the land to which the way is made an appurtenance, his grantees, near and remote, acquire an easement.

From the Hancock Circuit Court.

J. A. New, J. W. Jones, C. G. Offutt and R. A. Black, for appellant.

E. Marsh, W. W. Cook and W. H. Martin, for appellee.

ELLIOTT, C. J.—The first paragraph of the appellant's complaint alleges that the appellant owns in fee a described tract of land; that the appellee is the owner of another tract of land, which is specifically described; that for fifty consecutive years a way has existed over the appellee's land; that for twenty years the way has been open to the appellant as an easement, and that he and his grantors have been permitted by the appellee and his grantors to uninterruptedly use the way for fifty years, and that in March, 1883, the appellee wrongfully closed up the way.

There was no error in sustaining a demurrer to this paragraph. On the facts pleaded, the appellant had a mere naked license to use the land of the appellee, and such a license is revocable at the pleasure of the licensor. *Williamson v. Yingling*, 93 Ind. 42; *Rogers v. Cox*, 96 Ind. 157 (49 Am. R. 152); *Nowlin v. Whipple*, 79 Ind. 481; *Hodgson v. Jeffries*, 52 Ind. 334; *Miller v. State*, 39 Ind. 267; *Snowden v. Wilas*, 19 Ind. 10; *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Wiseman v. Lucksinger*, 84 N. Y. 31 (38 Am. R. 479); *Ellsworth v.*

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Southern, etc., Co., 31 Minn. 543; *Batchelder v. Hibbard*, 58 N. H. 269; *Lockhart v. Geir*, 54 Wis. 133.

A license does not convey any title to the land, and where a mere license is relied on, it must appear that there was a consideration paid for it, or it will be deemed revocable at the will of the person granting it. *Clauser v. Jones*, 100 Ind. 123; *New York, etc., R. W. Co. v. Randall*, 102 Ind. 453; *Malott v. Price*, ante, p. 22.

Where a consideration is paid, or value has been parted with, on the faith that the license is perpetual, then it can not be revoked. *Rogers v. Cox*, supra; *Buchanan v. Logansport, etc., R. W. Co.*, 71 Ind. 265.

There can be no title by prescription, because it does not appear that the user was under claim of right. *Postlethwaite v. Payne*, 8 Ind. 104; *Peterson v. McCullough*, 50 Ind. 35; *Palmer v. Wright*, 58 Ind. 486; *McCardle v. Barricklow*, 68 Ind. 356.

An owner of land is not shorn of any of his rights by merely permitting, as a favor, another to pass over his land. In order to establish a prescriptive right, something more than mere permissive user must be shown. *Goddard Easements* (Bennett's Ed.), 134.

The use of land for the purpose of passing over it is not inconsistent with the right of ownership, and where there is no inconsistency between the use and the ownership, there can be no prescriptive right. It is not necessary, to establish a prescriptive easement, that there should be color of title; but it is necessary that the use should be under an assertion of right, and not simply a user under a naked license.

There is a similarity between the first and second paragraphs of the complaint, but there is nevertheless an essential difference. The allegations which exhibit this difference are these: "And plaintiff says that the remote grantor of the plaintiff and the defendant was the owner of the real estate now owned by the defendant and that owned by the plaintiff; that the remote grantor conveyed the tract of land owned by

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the plaintiff to the remote grantor of plaintiff, and as a part of said conveyance an easement was given to said purchaser over the defendant's real estate, and that the same was at said time laid out and fenced off by said grantor, and that the same has been so continuously laid out, and has always since said time been held as an easement by the plaintiff and his grantors to his, plaintiff's, real estate. And plaintiff avers that when said private way was opened by the grantor of the defendant, for the purpose of preventing stock from entering upon the adjoining tracts of land, said grantor erected a gate at the western extremity of said way, but that the said gate was not put up for the purpose of hindering plaintiff's grantors from travelling over the said way, and that their right to so pass over said way was not at any time questioned. And the plaintiff says that Jacob Munson was formerly the owner of all the real estate now owned by the defendant, over which said way passes, and also the tract of land of the plaintiff, and that in the year 1833, about fifty years ago, Jacob Munson conveyed the tract to one Weston, and at the same time gave the said Weston the right of way aforementioned as an appurtenance to said tract of land for a passage-way to a highway; that Munson then and there built a fence on each side of said way."

We think that this paragraph shows that the user began in 1833, under claim of right, and that the way is an appurtenance to the appellant's land. Where a right of way is granted, it becomes an appurtenance to the land, following it into the hands of each successive grantee. *Ross v. Thompson*, 78 Ind. 90.

If the way was made appurtenant to the land now owned by the appellant, in 1833, and has since been used by him and his grantors as an appurtenance, there can be no doubt that the user has been under claim of title. As the user has been under claim of title for more than twenty years, and has been uninterrupted, the fact, conceding it to be the fact, that the original claim was not well founded, would not destroy the

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easement. But we think that it can not be said to be a fact that the original claim was not well founded, for, if the way was laid out as appurtenant to the land, and actually became an appurtenance, then it needed no express grant to convey it. *Ross v. Thompson, supra*; Washburn Easements, 25, section 12.

We suppose it to be perfectly clear, that if the owner of land annexes to part of it a right of way as appurtenant to the land, and then conveys the land to which the way is made an appurtenance, his grantees, near and remote, acquire an easement.

The court erred in sustaining the demurrer to the second paragraph of the complaint.

Judgment reversed.

Filed Jan. 15, 1887; petition for a rehearing overruled April 6, 1887.

No. 13,239.

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CRIMINAL LAW.—Trial by Special Jury.—Under the statutes of this State the courts have power, when it becomes necessary, to call a special jury to try a criminal cause.

SAME.—Instructions.—When Defects in Cured.—An erroneous instruction, unless it be plainly withdrawn, can not be corrected by giving an accurate but inconsistent instruction on the same subject; where, however, an inaccuracy in one instruction consists in its being merely incomplete or obscure, it may be remedied by another instruction.

SAME.—Reasonable Doubt.—Reversal of Judgment.—In order to justify the reversal of a judgment for a merely inaccurate definition of what constitutes a reasonable doubt, it must very plainly appear that the defendant was thereby prejudiced in his substantial rights.

SAME.—Prosecuting Attorney.—Argument.—Reference by the prosecuting attorney, in his closing argument to the jury, to recent riots in a city of another State and the burning of the court-house by a mob, attributing

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the cause to the lax administration of the criminal law in that city, but not alluding to the defendant in that connection, is not a transgression of his privileges.

SAME.—Misconduct in Argument.—A statement by the prosecuting attorney, in argument to the jury, that he has personal knowledge of the fact that the defendant is reputed to be a hotel thief, and that he has been published and portrayed in the Police Gazette as such, is misconduct, but where it appears from the evidence that a conviction was in any event inevitable, and that the punishment assessed is not excessive, the judgment will not be reversed.

From the Marion Criminal Court.

J. W. Gordon, L. O. Bailey, M. Carey and T. J. Cogan,
for appellant.

L. T. Michener, Attorney General, and J. H. Gillett, for the State.

MITCHELL, J.—The appellant was tried upon an information, and found guilty of the charge of grand larceny. He was sentenced to a fine and five years imprisonment in the State's prison.

No regular panel of jurors having been drawn or returned for the term at which the trial took place, the bailiff, by the direction of the court, called from the by-standers, twelve qualified persons as jurors. The appellant objected to being tried by a jury thus selected.

The first point insisted upon is that the court erred in requiring him to submit his cause to a special jury.

That justice must use right means in attaining its ends, and that its ends when attained must be such as the law allows and approves, can not be denied.

The question is, did the court proceed in the organization of the jury in a manner which the law does not sanction?

Section 1396, R. S. 1881, reads as follows: "In all cases when the proper officers have failed or refused to draw and empanel a traverse jury, or where, for any other cause whatever, no traverse jury shall be present at any term of the court, it shall be lawful, and is hereby made the duty of the

circuit court, if the business thereof require it, to order the sheriff to summon a jury from the by-standers or citizens of the county," etc.

Section 1790 provides that the trial jury used in civil cases shall act in criminal cases, and that the sheriff, in case a jury trial is demanded, shall call a jury in the manner prescribed by law, or as directed by the court.

Section 522 provides that "The court shall have the power, where the business thereof requires it, to order the empaneling of a special jury for the trial of any cause."

These sections of the statute leave no room to doubt the power of the court to empanel a special jury under the circumstances disclosed in the record.

The officers charged with the duty of drawing or selecting a jury may have neglected their duty. It may often happen that a panel regularly selected becomes disqualified. It can not be permitted that circumstances such as we have mentioned should deprive the court of the necessary machinery for the transaction of its business. Hence the statutes to which we have referred make provision for any such emergency.

No question is made but that the jurors empanelled possessed all the requisite statutory qualifications. Nor is there any claim that they did not, when empanelled, constitute "an impartial jury."

Having been selected and empanelled in a manner authorized by law, the constitutional rights of the appellant were not infringed. *Pierce v. State*, 67 Ind. 354; *Evarts v. State*, 48 Ind. 422; *Winsett v. State*, 57 Ind. 26.

The bill of exceptions states that no jury had been drawn for that term, so that even if it had been necessary, as is contended, that the record should affirmatively show the necessity for, or authority to call, a special jury, it does so appear. Without that, however, the regularity of the proceedings would have been presumed, in obedience to the maxim that "All acts are presumed to have been rightly and legally done."

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In its seventh charge the court instructed the jury, in substance, that if they had a reasonable doubt as to any material fact going to the defence, or necessary to make the cause, the defendant was entitled to the benefit of such doubt.

As to what constituted a reasonable doubt, the jury were told, in substance, that not every possible or frivolous doubt that might be conjured up, was a reasonable doubt; but that if the evidence in the case failed to satisfy their minds of the truth of every material proposition necessary to establish the criminal liability of the defendant, with such certainty that a prudent man would feel safe in voluntarily acting in his own important affairs, there would in such a case be a reasonable doubt, and that in that event they must acquit the defendant.

The fifteenth instruction asked by the defendant, and given by the court, is as follows: "A reasonable doubt exists, whenever, as long as taking all the evidence in the case together, and fairly considering it, it does not so satisfy your minds of the truth of the proposition to be found, that a reasonable and prudent man would feel safe to act upon it in matters involving his own most important affairs and dearest interests, voluntarily and under circumstances in which he was under no compulsion to act at all."

The argument of the appellant is, that the instruction given by the court of its own motion, upon the subject of what constitutes a reasonable doubt, was erroneous, and that although the court at his request subsequently instructed the jury correctly, on the same subject, since the first charge was not withdrawn, the error was not cured by giving an inconsistent although correct instruction.

The rule that an erroneous instruction, unless it be plainly withdrawn, can not be corrected by giving an accurate but inconsistent instruction on the same subject, is founded in reason, and is not to be infringed. Of course, if the law governing a material proposition involved in a case, is put

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to the jury in one instruction one way, and in the same or another in such a way as to be inconsistent with and contradictory of the first, the result must be confusion in the minds of the jury. In such a case the jury would be required to elect between inconsistent theories of the law upon the same subject. Where, however, an inaccuracy in one instruction consists in its being merely incomplete or obscure, it may be remedied by being made complete, certain and accurate by another instruction. The instructions under consideration fall within the rule last above stated. They are not contradictory or inconsistent. One is more complete than the other. In each is undertaken the oft repeated attempt to define in the abstract, and ascertain the elements of, a reasonable doubt. In one the jury are, in effect, told that a juror may reasonably doubt the defendant's guilt, until such a state of mental certainty is reached, that a prudent man would feel safe in voluntarily acting in his own important affairs. The other instruction added, as a requirement to remove a reasonable doubt, that the jurors should come to that mental condition in which a prudent man would feel safe in acting in a matter involving his most important affairs and dearest interests. As was pertinently said in *Garfield v. State*, 74 Ind. 60: "The case of *Bradley v. State* (31 Ind. 492) recognizes both these expressions as proper statements of the law, and the difference between them is not such as to justify an interference with the verdict." Indeed, we might add, that in order to justify the reversal of a case for a merely inaccurate definition of what constitutes a "reasonable doubt," it must very plainly appear that the defendant was prejudiced in his substantial rights thereby. The phrase involves too much that is in the nature of metaphysical abstraction, to enable a court to say that an entirely accurate definition has as yet been fully attained. *Boyle v. State*, 105 Ind. 469, 476 (55 Am. R. 218), and cases cited; *Brown v. State*, 105 Ind. 385.

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A number of points are suggested in the brief, which relate to rulings of the court upon the admission and exclusion respectively of various matters of evidence. None of them are made in such a way as to require examination by the court, or as to indicate that counsel deemed them of any consequence. We have, however, examined the points made and find nothing in any of them which would authorize a reversal of the judgment. In view of the mere mention of the points—eleven in number—by counsel in their brief, without any statement of the evidence admitted or excluded, except to refer us to the pages and lines of a voluminous record where it is to be found, we have not felt justified in stating each point separately, and the reasons for the holding that no error was committed, in respect to rulings on the admission or exclusion of evidence.

During his closing argument to the jury the prosecuting attorney referred to the riots in Cincinnati, and the burning of the court-house by a mob, which had occurred recently before the trial. He assigned as a cause for the mob-violence, the lax administration of the criminal law in that city. The appellant objected to the reference thus made, and the conclusions drawn. The court overruled the objection. The remarks alluded to above had reference to an historical event, concerning which the jury were supposed to be familiar, both in respect to its occurrence and the causes to which it was attributed.

As there was no allusion made to the defendant in that connection, or to his being in any manner concerned in the riots, we can not say that the privilege of fair debate was transgressed.

In his closing argument counsel for defendant, by way of illustrating the value of certain testimony given on behalf of the State to sustain the general reputation of a witness, said, in substance, that the witnesses did not profess to have any knowledge of the reputation of the witness whose testimony they were called to sustain, and that from the same

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standpoint he could personally sustain the general reputation of the defendant.

This was made the basis upon which the prosecutor said in argument that he had personal knowledge of the fact that the defendant was reputed to be a hotel thief, and that he had been published and portrayed in the Police Gazette as such.

The speech of the prosecutor went entirely beyond the bounds of propriety in that respect. It can not be justified. There was a bare shadow of excuse for it in what was said by the defendant's counsel. The remarks should have been promptly withdrawn from the jury, and the court should have admonished both the jury and counsel, in no uncertain terms, in respect to their duty in that connection. This was not done. The evidence in the record, however, fully sustains the verdict of the jury, and there was a shadow of excuse for the remarks.

Under such circumstances we have concluded, after some hesitation, that a reversal ought not to follow. Upon the evidence in the record, it seems to us that a conviction was at all events inevitable, and as the punishment assessed does not seem to have been out of proportion to the offence, we can not see that there could have been any prejudice to the substantial rights of the appellant. In such a case we are not authorized to reverse. *Epps v. State*, 102 Ind. 539; *Brown v. State*, *supra*.

Judgment affirmed, with costs.

Filed Feb. 25, 1887.

The Board of Comm'rs of Huntington Co. *et al.* v. The State, *ex rel.* Darnell.

No. 12,612.

THE BOARD OF COMMISSIONERS OF HUNTINGTON COUNTY
ET AL. v. THE STATE, EX REL. DARNELL.

MANDATE.—*Return.*—*Taxes in Aid of Railroad.*—*Reinstatement on Duplicate.*—*Agreement to Accept Less than Full Amount.*—*Election Expenses.*—Upon a petition for a mandate to compel county commissioners to reinstate on the duplicate taxes assessed in favor of a railroad company, a return showing that in a prior proceeding the beneficiaries of the tax had agreed to accept a certain sum, if paid within sixty days, in full satisfaction of all claims on account of such tax, and that each taxpayer who should pay his proportion of such sum should be entitled to a receipt in full, and further showing that such per cent. had been collected from all who paid within sixty days, and from all others the full amount assessed against them, which had been paid over to the beneficiaries, excepting only the expenses of the election, is good, even though the withholding of the election expenses was wrongful.

SAME.—*Payment of Less Sum will not Discharge Greater.*—*Extent of Rule.*—The rule that the payment of a less sum will not discharge a greater, only applies where the sum is liquidated, and is due upon contract. It can not apply to a claim founded upon a statutory proceeding assessing a tax in aid of a railroad corporation.

From the Huntington Circuit Court.

J. C. Branyan, M. L. Spencer, R. A. Kaufman and W. A. Branyan, for appellants.

L. P. Milligan, for appellee.

ELLIOTT, C. J.—The appellee's relator petitioned the Huntington Circuit Court for a writ of mandate to compel the board of commissioners to reinstate on the duplicate taxes which had been assessed in favor of the Delphos, Bluffton and Frankfort Railway Company. The return to the alternative writ alleges, in confession and avoidance, that the appellee's relator is barred by the proceedings before the board and by an agreement entered into between the parties in interest. The proceedings and agreement are as follows:

"Now comes C. Cowgill, attorney for A. G. Wells & Co., and moves the board for an order directing the treasurer to

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proceed to collect the taxes heretofore levied to aid in the construction of the Delphos, Bluffton and Frankfort Railway in Jefferson township, and upon proof made and due deliberation thereon, the board do find as follows, to wit:

"1st. That by a consolidation of said railroad with other railroad companies, said road is now constructed and in operation in and through said township by and under the corporate name of the Toledo, Delphos and Burlington Railroad Company.

"2d. That more than \$10,164 has been expended by said railroad company in said township.

"3d. That the taxes levied at the June term, 1879, of this board, and the collection of which has been suspended by the action of the auditor and treasurer of this county, are now due and should be collected.

"4th. That A. G. Wells & Co. were contractors on said road in the construction thereof, and that, by a transfer and assignment of said Toledo, Delphos and Burlington Railroad Company to said A. G. Wells & Co., in part payment for said work of construction, they are the sole beneficiaries of the fund to be derived from the collection of said taxes, and are entitled to have the same paid to them when collected. And the board do now order the treasurer of Huntington county to proceed to the collection of said taxes at once, in the same manner that State and county taxes are collected, all of which is finally ordered, adjudged and decreed.

"And it is proposed and agreed by said A. G. Wells & Co., now in open court, that if \$8,000 is paid to them within sixty days from this date, that sum will and shall be received in full satisfaction of all claims whatever against said Jefferson township on account of the taxes so voted and levied to aid in the construction of said railroad; and in pursuance of said proposition and agreement, it is further ordered by the board that each and every taxpayer that is charged with taxes on the duplicate by virtue of the levy aforesaid, who shall, within sixty days from this date, pay to

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the treasurer that proportion of the taxes that stand charged against him, or her, as the case may be, on said tax duplicate, that the whole of his or her taxes bears to \$8,000, he or she, as the case may be, shall be entitled to a full receipt of said taxes. But said proposition and release only applies to such taxpayers as pay within said sixty days, or have already paid, and the auditor and treasurer are hereby authorized and directed to ascertain and state for the benefit of the treasurer and taxpayers the per centum deduction that each taxpayer would be entitled to have made under such proposition and a compliance therewith. And it is further ordered that a subscription of stock shall be made in said railroad company for the benefit of said township, in the sum that shall be paid to said A. G. Wells & Co."

It is averred in the return that, "In pursuance of said agreement, the auditor, with the consent of said assignees, collected said eighty per cent. of said tax from all such taxpayers of said township as paid within sixty days, and of all such as did not pay within sixty days, he collected the whole amount of said tax, including penalties and interest, and paid over to the said assignees all of said several sums, excepting only such as was due from said railroad company for the costs and expenses incident to the holding of the election."

We can see no valid legal objection to this return, although it is very badly drawn, and contains much surplusage. If the taxpayers paid all the taxes which they were liable to pay under the agreement, there was neither necessity nor propriety for placing the taxes on the duplicate. If those who, by the terms of the agreement, were to pay a less sum than the amount assessed, did pay it within sixty days, then nothing more can be collected from them. If those who were to pay the full amount did pay it, then they are discharged. It is quite clear that Wells & Co. could not enforce payment from those who had made payment in compliance with the

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terms of the agreement, and certainly not from those who paid the full amount assessed against them.

If it were true that the county officers had misapplied the money collected, the remedy would not be against the taxpayers. Their duty was done, and their liability ended, when they paid all they were legally bound to pay.

The rule that the payment of a less sum will not discharge a greater can not apply here, for that rule only applies where the sum is liquidated and is due upon contract. Here there was no contract creating a liability against the taxpayers, for the only claim held by any one was founded upon a statutory proceeding, assessing a tax in aid of a railroad corporation. To such a case the rule referred to can not be extended.

We do not think that the assignment of the interest in the taxes cut off the right of the assignees to receive them when collected; but we do think that when they received the per centum agreed upon from those who paid within sixty days, and the full amount from those who did not pay within that time, they can not claim more. Nor is it material, so far as the rights of the taxpayers are concerned, that the county officers wrongfully kept five hundred dollars for election expenses out of the taxes collected, for, if the taxpayers paid all they were legally liable to pay, the auditor can not be compelled by mandate to take steps to collect the taxes.

Judgment reversed.

Filed Feb. 25, 1887.

Whittaker *et al.* v. The State, for use of Dorsett, Drainage Commissioner.

No. 12,746.

WHITTAKER ET AL. v. THE STATE, FOR USE OF DORSETT,
DRAINAGE COMMISSIONER.

From the Morgan Circuit Court.

J. H. Jordan and *O. Matthews*, for appellants.

G. W. Grubbs and *M. H. Parks*, for appellee.

Howe, J.—In this case, it is conceded by counsel as well of the appellee as of appellants, that the same questions are presented herein for our decision, and in the same manner, as those which were fully considered and decided by this court, at the present term, in *Kennedy v. State, for use, etc., ante*, p. 236. Upon the authority of the case cited, and for the reasons there given, it must be held in this cause that the court below erred in overruling appellants' demurrer to the second paragraph of appellee's complaint herein.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the demurrer to the second paragraph of the complaint, etc.

Filed Jan. 13, 1887.

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2. *Same.*—*Rule when One of Two Innocent Parties Must Suffer.*—Whenever one of two innocent parties must suffer by the acts of a third, he who has enabled the third person to occasion the loss must sustain it. *Ib.*

BASTARDY.

See SHERIFF.

BILL OF EXCEPTIONS.

See CRIMINAL LAW, 19; INSTRUCTIONS TO JURY, 1; PLEADING, 3.

1. *Action.*—*Motion to Dismiss.*—*Supreme Court.*—If a motion to dismiss an action in the trial court is not brought into the record by a bill of exceptions, no question relating thereto is presented on appeal. *Board, etc., v. Montgomery, 69*
2. *Practice.*—*Short-Hand Reporter.*—*Long-Hand Report of Evidence.*—*Exhibits.*—*Original Papers, When Part of Record.*—*Supreme Court.*—Original papers read in evidence, and accompanying and identified by the long-hand report of the evidence taken down in short-hand by the official reporter, will be treated in the Supreme Court as constituting a part of such report, and as properly in the record when embraced in a bill of exceptions. *Indiana, etc., R. W. Co. v. Quick, 295*
3. *Appeal.*—*Practice.*—*Long-Hand Manuscript.*—Where the long-hand manuscript of the evidence is filed with and as a part of the bill of exceptions, that is a sufficient filing; and when thus filed, it may be taken from the bill of exceptions and made a part of the record on appeal without being copied. *Hull v. Louth, 315*
4. *Same.*—*Practice.*—Where the record containing a bill of exceptions shows that such bill was within the proper time presented to the judge, certified by him as correct, and ordered to be made part of the record, and bears a certificate of the clerk that such record is a full and complete transcript of the proceedings, papers filed, etc., it sufficiently shows a filing of such bill of exceptions within the proper time, whether it is endorsed as having been so filed or not. *Ib.*

BILL OF LADING.

See RAILROAD, 13 to 15.

BOND.

See PRINCIPAL AND SURETY.

BOUNDARIES.

See ELECTIONS.

BRIBERY.

See CRIMINAL LAW, 4 to 11.

BURDEN OF PROOF.

See DEED, 8, 12; RAILROAD, 8; REAL ESTATE, ACTION TO RECOVER, 3, 4.

CASES QUESTIONED, CRITICISED AND DISTINGUISHED.

- Wallace v. Lawyer*, 54 Ind. 501, criticised. *Baker v. State, ex rel.*, 47
Smith v. Duncan, 77 Ind. 92, questioned. *Taber v. Grafmiller*, 206
Scott v. Brackett, 89 Ind. 413, distinguished. *Laverty v. State, ex rel.*, 217
State, ex rel., v. Hamilton, 33 Ind. 502, and cases following it, distinguished.
State, ex rel., v. Newcomer, 345

CHATTEL MORTGAGE.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 2 to 4; NOTICE, 2; SPECIAL FINDING, 4.

1. *Partnership.—Fraud.—Debtor and Creditor.—Voluntary Assignment.*—A chattel mortgage given by a new firm to secure a *bona fide* indebtedness of the old partnership, or of an individual member of the latter, is not therefore fraudulent as against creditors of the new firm; nor does the fact that an assignment for the benefit of creditors is subsequently made, affect its validity. *Fisher v. Syfers*, 514
2. *Same.—Mortgage of Merchandise.—Renewals of Stock.*—A stipulation in a chattel mortgage covering a stock of merchandise, that additions and renewals of the stock shall be deemed to be covered by the mortgage, will not vest title thereto in the mortgagee unless followed by possession by the latter before the rights of others attach, but it does not render the mortgage invalid on its face. *Ib.*
3. *Same.—Possession by Mortgagor.—Power to Sell.*—A fraudulent intent can not be judicially inferred from the fact that the mortgagor, by the terms of the mortgage, may remain in possession, with leave to sell, even though he be not required by a stipulation in the mortgage to account for the proceeds of the sales. *Ib.*
4. *Same.—Pleading.—Allegations of Fraud.*—A general averment of fraud, without more, is not sufficient to defeat a chattel mortgage. Whether it is fraudulent or not is a question of fact to be determined according to the circumstances of each case. *Ib.*

CITY.

See DEDICATION; INJUNCTION, 1; MORTGAGE, 6; QUO WARRANTO; TOWN.

1. *Sidewalk.—Improvement.—Resolution.*—For a resolution adopted by the common council of a city, which is held sufficient to authorize a sidewalk improvement, see opinion. *Taber v. Grafmiller*, 206
2. *Same.—Description of Improvement.—Sufficiency of Resolution.*—It is sufficient if the resolution provides that the improvement shall be of a designated character, and contains enough to constitute the basis for letting the contract, without specifying with particularity of detail what such improvement shall be. *Ib.*
3. *Same.—Plans and Specifications.—Civil Engineer.—Presumption.*—It is the statutory duty of the city civil engineer to prepare plans and specifications of proposed street improvements, and it will be presumed that he prepares them in proper time and conformably to the ordinances. *Smith v. Duncan*, 77 Ind. 92, questioned. *Ib.*
4. *Same.—“Street” Embraces “Sidewalk.”*—The word “street” is a generic one, embracing sidewalks, and under an authority to improve streets a municipal corporation may improve sidewalks. *Ib.*
5. *Same.—Agricultural Land.—Assessment.*—Land within the limits of a

- city, although held for agricultural purposes, is subject to local assessments for street improvements. *Ib.*
6. *Same.—Street Improvement.—Notice.*—If the common council of a city directs that notices inviting proposals for the improvement of a street shall be published in two newspapers, publication in one is not sufficient. *Taber v. Ferguson, 227*
7. *Same.—Transcript.—Collection of Assessment.—Sufficiency of Notice.*—As the transcript certified by the city clerk is made by law to stand in the nature of a complaint in a proceeding by a contractor to collect an assessment, it is good on demurrer if it shows some notice. If the notice is insufficient the fact must be set up as a defence by way of answer. *Ib.*
8. *Same.—Quære, whether in a proceeding to enforce a street assessment the sufficiency of the notice inviting proposals can be inquired into as a fact.* See opinion for cases *pro* and *con*. *Ib.*
9. *Same.—Estoppel.—Contract.*—A property-owner can not quietly permit money to be expended on work which benefits his land, under a contract with the city, and then deny the power of the city to make the contract. *Ib.*
10. *Same.—Estimate.*—The final order of the common council directing an estimate is not affected by a previous order refusing to do so. *Ib.*
11. *Same.—Assignment of Estimate.—Ratification.*—A ratification by the common council of an assignment of the estimate by the contractor, is equivalent to precedent authority, and entitles the assignee to collect the assessments. *Ib.*
12. *Same.—Description of Improvement.*—A resolution of the common council providing for the improvement of a street, is sufficient if it gives a general direction as to the character of the improvement, without describing it in detail. *Ib.*
13. *Same.—Plans and Specifications.—Evidence.*—The plans and specifications prepared by the city engineer are competent evidence in a suit to collect a street assessment. *Ib.*
14. *Street Improvement.—Assessment.—Complaint to Enjoin Collection.—Ordinance.—Yeas and Nays.—Estimate.—Mistake.*—Questions as to the taking of the yeas and nays on the passage of an ordinance, as to the amount of the estimate and as to a mistake in describing the property, can not be presented by a complaint to enjoin the collection of a street improvement assessment. *Balfe v. Lammers, 347*
15. *Same.—Appeal from Precept.—Conclusiveness of Judgment.—Description.—New Precept.*—Where, on appeal by a property-owner from a precept, the proceedings are sustained, and judgment is rendered in favor of the contractor, the latter is concluded by it, if unappealed from, as to all questions before the court, including the validity of the estimate and the sufficiency of the description, and can not take out another precept. *Ib.*
16. *Intoxicating Liquor.—Regulation of Sale.—Power to Require License.—Jurisdiction Over Territory Beyond Corporate Limits.*—Under sections 3106 and 3154, R. S. 1881, an incorporated city has power, within its corporate limits and for two miles beyond, to regulate all places where intoxicating liquors are kept for sale to be used on the premises, and to require a license from all keepers of such places, as well those who have a license from the State or county as those who have not. *Lutz v. City of Crawfordsville, 466*
17. *Same.—Power of Legislature to Prescribe Limits of Jurisdiction.*—The Legislature has power to designate the limits over which the jurisdiction

of municipal corporations shall extend, and its judgment upon the question is conclusive. *1b.*

18. *Same.—License by Different Jurisdictions.*—The grant of a license by one jurisdiction does not affect the right of another jurisdiction to also exact a license fee, nor authorize the licensee to sell in violation of the law of the other. *15.*

CIVIL ENGINEER.

See CITY, 3, 13.

COLLATERAL ATTACK.

See COUNTY, 2; HABEAS CORPUS; JUDGMENT, 12, 13.

COMMISSIONER'S DEED.

See NOTICE, 3.

COMMON CARRIER.

See RAILROAD, 2, 3, 5, 13 to 15.

COMMON SCHOOLS.

See SCHOOLS; SCHOOL FUNDS.

CONSIDERATION.

See DEED, 7; EVIDENCE, 6; MARRIED WOMAN; MORTGAGE, 2, 3; PROMISSORY NOTE, 4; STATUTE OF FRAUDS, 1, 2.

CONSPIRACY.

See CRIMINAL LAW, 14, 15.

CONSTITUTIONAL LAW.

See JUDGMENT, 1; JURISDICTION, 5; MEDICINE AND SURGERY.

CONTESTED ELECTION.

See JURISDICTION, 5.

CONTINUANCE.

1. *Refusal to Grant.—Harmless Error.*—Where a party is not injured by the overruling of a motion for a continuance, there can be no reversible error. *McKinsey v. McKee, 209*
2. *Same.—Absent Witness.—Diligence.*—To entitle a party to a continuance on account of the absence of a witness, he must show that he has exercised proper diligence to obtain the testimony of such witness. *1b.*

CONTRACT.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 3; CITY, 2, 9; CRIMINAL LAW, 4 to 11; DEED, 1, 9 to 11; ESTOPPEL, 1; MANDAMUS; MARRIED WOMAN; NOTICE, 1, 2; PAYMENT; PRINCIPAL AND SURETY; RAILROAD, 13 to 15; SALE; STATUTE OF FRAUDS; SUPREME COURT, 1.

Conditional Insurance.—Forfeiture.—Sale.—Executor.—Where a mare, insured to get with foal, is sold by the executor of the owner within eleven months from the date of service, in violation of a condition that a sale by the owner within that time should forfeit the insurance, the price for the service may be recovered. *Cummins v. Peed, 71*

CONVERSION.

See SALE, 3.

1. *Pleading.—Complaint to Recover Damages.*—A complaint to recover damages for the conversion of personal property need not allege that the plaintiff is entitled to possession of such property. *Baals v. Stewart, 571*
2. *Same.—Joinder of Causes of Action.*—Under the fourth clause of section 278, R. S. 1881, a paragraph of complaint to recover damages for con-

version may be joined with a paragraph to recover possession of the same property. *Ib.*

CONVEYANCE.

See DEED; EVIDENCE, 6, 7; FRAUDULENT CONVEYANCE; PROMISSORY NOTE, 4; SCHOOLS.

CORPORATION.

See INSURANCE; RAILROAD; SCHOOLS; TELEGRAPH COMPANY.

COUNTER-CLAIM.

See DRAINAGE, 4.

COUNTY.

1. *Bridges.—Liability for Negligence.*—Counties are liable for injuries caused by negligence in constructing or maintaining bridges.

Board, etc., v. Montgomery, 69

2. *Same.—Evidence.—Establishment of Highway.—Validity of Proceedings.*—In an action against a county to recover for injuries caused by a defective bridge, evidence that the county commissioners assumed to establish the highway of which the bridge is a part, is competent, although it may appear that there are errors and irregularities in the proceedings. The validity of such proceedings can not be inquired into in such case. *Ib.*

COUNTY AUDITOR.

See SCHOOL FUNDS, 3.

COUNTY CLERK.

See MEDICINE AND SURGERY, 2.

COUNTY COMMISSIONERS.

See COUNTY; ELECTIONS.

COUNTY SURVEYOR.

See SURVEY.

COUNTY TREASURER.

See TAXES, 6 to 8.

CRIMINAL LAW.

See HABEAS CORPUS; INTOXICATING LIQUOR; PRACTICE, 2.

1. *Frequenting Gambling House.—Evidence.*—Where a person is indicted for frequenting a place where gambling is permitted, evidence that the defendant was in such place on one occasion is not sufficient to sustain a conviction. *Green v. State, 175*
2. *Assault.—Indictment.*—Under section 1910, R. S. 1881, an affidavit charging, after the date and venue, that the defendant "did then and there, having the present ability to do so, unlawfully attempt to commit a violent injury upon the person of" the affiant, contrary, etc., is sufficient as charging an assault. *State v. Kinder, 226*
3. *Indictment.—Language of Statute.*—It is sufficient to charge an offence in the language of the statute. *Eastman v. State, 273*
4. *Accepting Bribe.—Indictment.—Sufficiency of.*—An indictment which charges that the defendant was a township trustee, and *ex officio* trustee of a school township; that as such trustee it was his duty to contract for, purchase and furnish to the school township, for its use, furniture, materials and supplies; that while holding said office he unlawfully, feloniously and corruptly accepted from one P. the sum of \$3,500 in money as a bribe and to influence him, the said defendant, in the discharge of his official duties, and that he was influ-

enced as such officer by the acceptance of said sum of money, to enter into a contract with said P. for the purchase from him, in behalf of and for the use of such school township, of a large amount of school furniture, material and supplies, to the amount, price and value of \$10,000, is sufficiently explicit under section 2009, R. S. 1881.

Glover v. State, 391

5. *Same.—Immaterial Averments.*—In such case the *gravamen* of the offence is the acceptance of money to influence the official action of the defendant in contracting for and purchasing the supplies, and an averment in the indictment as to the amount, quality or description of the property contracted for or purchased, is entirely unnecessary. *Ib.*
6. *Same.*—In such case an allegation in the indictment, that the person giving the bribe did so with the intent of inducing the defendant to do some act to favor and aid such person, is unnecessary, it being an immaterial question as to whether the giver of the bribe was profited or not. *Ib.*
7. *Same.—Township Trustee.—Bribery of.—Defence.*—In a prosecution against a township trustee, *ex officio* trustee of a school township, under section 2009, R. S. 1881, for accepting a bribe to influence him in his official action, and for entering into a contract for supplies in pursuance of such bribe, it is no defence that such contract was void and not enforceable against the township. *Ib.*
8. *Same.—Indictment.—Duplicity.—Motion to Quash.*—When, from an inspection of the indictment, it is not certain that different and distinct felonies, which can not be joined, are charged in the different counts, a motion to quash, on account of duplicity, should be overruled. *Ib.*
9. *Same.—Election by Prosecuting Attorney.—When not Required.—Discretion of Trial Court.*—The question as to whether or not the prosecuting attorney should be required to elect and designate the count of the indictment upon which he will proceed, is a matter largely in the discretion of the trial court, and when it is not apparent on the face of the indictment that different and distinct offences, which can not be properly joined, are charged, an election should not be required. *Ib.*
10. *Same.—Evidence.—Admissions.*—On the trial of a defendant charged with having accepted a bribe, as trustee of a school township, and with having been influenced thereby to make purchases of school supplies, etc., in payment of which township warrants were by him issued, where an admission of the defendant is proved, that a certain letter received by him as such trustee, from a third party, contained a correct list of township warrants issued by him, and that they were so issued and delivered, in consideration of money received by him, such letter is admissible in evidence. *Ib.*
11. *Same.—Evidence.*—In such case it is not material whether the money was paid over to the defendant before or at the time he entered into the contract, or issued the warrants. It is sufficient if he received the money afterwards in pursuance of a prior arrangement and agreement. *Ib.*
12. *Instructions to Jury.—Signature of Party.—Practice.*—It is not error to refuse to give instructions to the jury, which are not signed by the party asking them. *Ib.*
13. *Forgery.—Indictment.—Uncertainty.*—A written instrument, reading, "September 4, 1886. Mr. T. Hemphill: Please let Charles Shannon have one dress pattern, and oblige (signed) Theodore Points," is so uncertain that the averment of extrinsic facts, showing its fraudulent tendency, is necessary to the sufficiency of an indictment charging forgery. *Shannon v. State, 417*
14. *Conspiracy.—Evidence.—Declarations of Co-Conspirator.*—Where a con-

- spiracy has first been established by sufficient proof, every declaration or act of any one of the conspirators, during the pendency of the criminal enterprise, in pursuance of the original plan and with reference to the common object, is competent evidence against each of them. *Card v. State, 415*
15. *Same.—Forgery.—Conspiracy.—System.—Proof of Other Forgeries.*—Where, on the trial of one charged with the forgery of a promissory note, it is shown that the crime in question is one of a system of like crimes committed by the defendant in pursuance of a conspiracy, other notes forged by him during the pendency of the conspiracy and purporting to be executed by different persons, are admissible in evidence against him. *Ib.*
 16. *Appeal from Justice.—Presumption of Regularity.*—In the absence of a showing to the contrary, it will be presumed that an appeal from a justice of the peace to the circuit court was regularly taken. *State v. McKee, 497*
 17. *Same.—Malicious Trespass.—Affidavit.*—It must be charged in an affidavit for malicious trespass, that the property was injured, the amount of the damage resulting from the injury, and that the person alleged to have been damaged is the owner of the property. *Ib.*
 18. *Same.—Insufficient Affidavit.*—An affidavit, charging that the defendant "did unlawfully and maliciously throw down the fence and pass over the enclosed lands" of the affiant, to his "damage in the sum of five dollars," is not sufficient. *Ib.*
 19. *Same.—Motion for Leave to File New Affidavit.—Bill of Exceptions.*—A motion by the prosecuting attorney for leave to file a new affidavit in lieu of another, and the ruling of the court refusing leave, must be made part of the record by bill of exceptions. *Ib.*
 20. *Arson.—Indictment.—Occupancy of Dwelling.*—In an indictment for arson, it is unnecessary to charge who was the occupant of the dwelling-house alleged to have been destroyed. *Garrett v. State, 527*
 21. *Same.—Husband and Wife.*—If a man unlawfully, feloniously, wilfully and maliciously sets fire to and burns the dwelling-house of his wife, wherein she permits him to live with her as her husband, he is guilty of arson, though he may have furnished the money to build the house. *Ib.*
 22. *Same.—Weight of Evidence.*—The Supreme Court will not disturb a verdict in a criminal case, on the sufficiency or weight of the evidence, where there is not an absolute failure of evidence on some material point. *Ib.*
 23. *Instructions to Jury.—Presumption on Appeal.—Practice.*—Where the court below erred in refusing to give to the jury instructions asked, but the record does not show that it contains all of the instructions given, it will be presumed on appeal, in aid of the judgment, that the law of the instructions refused had been given by the court of its own motion. *Ib.*
 24. *Affidavits.—Appeal.—Record.—Recital of Clerk.*—Affidavits can not be made part of the record by a mere recital of the clerk. *Pattee v. State, 545*
 25. *Same.—Plea of Guilty.—Refusal to Permit Withdrawal.—Discretion.*—In the absence of a showing that there was an abuse of discretion, the refusal of the trial court to permit the withdrawal of a plea of guilty will be upheld. *Ib.*
 26. *Same.—Information.—Supreme Court.—Assignment of Error.—Practice.*—The sufficiency of an information may be questioned for the first time

- in the Supreme Court by an assignment of error, but only on the ground that it does not charge a public offence. *Ib.*
27. *Same.—False Pretences.—Information.*—It is necessary to the validity of an information for obtaining money by false pretences, to aver that the pretences upon which the money was obtained were false. *Ib.*
28. *Trial by Special Jury.*—Under the statutes of this State the courts have power, when it becomes necessary, to call a special jury to try a criminal cause. *Heyl v. State, 589*
29. *Same.—Instructions.—When Defects in Cured.*—An erroneous instruction, unless it be plainly withdrawn, can not be corrected by giving an accurate but inconsistent instruction on the same subject; where, however, an inaccuracy in one instruction consists in its being merely incomplete or obscure, it may be remedied by another instruction. *Ib.*
30. *Same.—Reasonable Doubt.—Reversal of Judgment.*—In order to justify the reversal of a judgment for a merely inaccurate definition of what constitutes a reasonable doubt, it must very plainly appear that the defendant was thereby prejudiced in his substantial rights. *Ib.*
31. *Same.—Prosecuting Attorney.—Argument.*—Reference by the prosecuting attorney, in his closing argument to the jury, to recent riots in a city of another State and the burning of the court-house by a mob, attributing the cause to the lax administration of the criminal law in that city, but not alluding to the defendant in that connection, is not a transgression of his privileges. *Ib.*
32. *Same.—Misconduct in Argument.*—A statement by the prosecuting attorney, in argument to the jury, that he has personal knowledge of the fact that the defendant is reputed to be a hotel thief, and that he has been published and portrayed in the Police Gazette as such, is misconduct, but where it appears from the evidence that a conviction was in any event inevitable, and that the punishment assessed is not excessive, the judgment will not be reversed. *Ib.*

DAMAGES.

See ASSESSMENT OF DAMAGES; CONVERSION; COUNTY; DRAINAGE, 4; MORTGAGE, 6; NEGLIGENCE; PRINCIPAL AND SURETY; RAILROAD, 6; SALE, 3; SHERIFF; WATERCOURSE.

DEBTOR AND CREDITOR.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; CHATTEL MORTGAGE; FRAUDULENT CONVEYANCE; JUDGMENT, 1 to 8; STATUTE OF FRAUDS.

DECEDENTS' ESTATES.

See DESCENT; ESTOPPEL, 4; EXECUTORS AND ADMINISTRATORS; FRAUDULENT CONVEYANCE, 3; PLEADING, 1; WILL.

Administrator.—Care Respecting Property.—An administrator is required to adopt such precautions against loss to property coming under his care as ordinarily prudent men are accustomed to employ with respect to their own property. *Cooper v. Williams, 270*

DEDICATION.

Statutory.—User.—Town.—Streets and Alleys.—Streets and alleys of a town, as fixed by continuous user for more than twenty years, will prevail as against a prior invalid statutory dedication. *Wallman v. Rund, 366*

DEED.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; ESTOPPEL, 4; EVIDENCE, 8; FRAUDULENT CONVEYANCE; MORTGAGE, 1, 3 to 5; NEW TRIAL; NOTICE, 3; PROMISSORY NOTE, 4; QUIETING TITLE.

1. *Cancellation.—Contract.—Rescission.—Cross Bill.—When Court Should Direct Filing of.*—B. was induced to convey to S., by warranty deed, a

tract of land owned by him and a tract owned by M., by an agreement of S. to pay the purchase-money for the former tract and the amount of a mortgage held on the latter tract by B., and to pay M. the balance of the agreed price of his land, M. thereupon to convey the same to B.; S. failed to pay M. and he refused to convey to B. Suit by B. to rescind the contract and to cancel his deed.

Held, that B. is entitled to the relief prayed, unless upon a cross bill M. compels the execution of the contract between himself and S., and that, all the parties being in court, the filing of such cross bill should have been directed in order that the whole controversy might be determined. *Sims v. Burk*, 214

2. *Acknowledgment*.—A deed is good between the parties without a certificate of acknowledgment. *Wines v. Woods*, 291

3. *Same*.—*Quitclaim*.—*Notice of Prior Sale*.—*Unrecorded Deed*.—One who receives a quitclaim deed, with notice that the land has been sold, takes no title as against a prior unrecorded deed held by a good faith purchaser. *Ib.*

4. *Same*.—*Construction*.—*Law of Place*.—The law of the place where real property is situated governs the construction and effect of a deed conveying it. *Ib.*

5. *Insanity of Grantor*.—*Disaffirmance*.—*Restitution*.—E., a person of unsound mind, incapable of comprehending the nature of the transaction, without any valuable consideration, conveyed her real estate to T. by deed, which was duly recorded. To secure a loan of money with which to pay off delinquent taxes and other liens against the land, T. executed a mortgage thereon to H., who had no knowledge of E.'s unsoundness of mind, but advanced the money and accepted the security in good faith, relying on the public records. E. received no benefit from the money, either in person or estate. In a suit by H. to foreclose the mortgage,

Held, that although there was no disaffirmance by E. or her guardian, and no offer to make restitution of the money advanced by H., the deed was at least voidable, and that H. could not recover, as against E., who was entitled to have her title quieted as against him, by cross complaint. *Hull v. Louth*, 315

6. *Same*.—*Person of Unsound Mind*.—Where a person of unsound mind is brought into court as a defendant, to answer as to any interest he may have in real estate theretofore conveyed by him, the filing of an answer and cross complaint by the guardian of such person is a sufficient disaffirmance of such conveyance. *Ib.*

7. *Same*.—*Consideration*.—*Insanity of Grantor*.—*Good Faith*.—A person holding land, for which he has paid no consideration, can not defeat an action to set aside his deed on account of the insanity of his grantor, by showing that the grantor had the appearance of being mentally sound, and that he accepted the deed without knowledge of the insanity of such grantor. *Ib.*

8. *Same*.—*Burden of Proof*.—When it is established that the grantor of real estate was a person of unsound mind at the time the conveyance was made, the burden is upon the other party to show that he accepted the conveyance in ignorance of such mental unsoundness, if he relies upon such fact. *Ib.*

9. *Reformation*.—*Mistake*.—*Mutuality*.—*Estoppel*.—*Contract*.—Where one party to an agreement has knowledge of a mistake, and of the other party's ignorance thereof, and with such knowledge remains silent when he should speak, he is estopped to defeat a reformation by asserting that the mistake lacks mutuality. *Roszell v. Roszell*, 354

10. *Same*.—*Title Bond*.—Where one purchases and pays full consideration

for land held by his vendor by title bond, and it is agreed that the latter shall cause a conveyance to be made to the purchaser, but, without his knowledge or consent, causes the conveyance to be made to the purchaser's son, a reformation of the deed can not be defeated on the ground that the mistake is not mutual. *Ib.*

11. *Same.—Statute Construed.—Parent and Child.*—The operation of section 2974, R. S. 1881, is restricted by subsequent sections to cases in which the party claiming the benefit of an alleged trust, himself created what he afterwards claims to be a trust, and does not prevent a father, who has paid the purchase-money, from showing that the deed was made to a child through mistake, or contrary to his intention. *Ib.*
12. *Same.—Acquiescence.—Burden of Proof.*—In a suit to reform a deed, brought within twenty years, the burden is on the defendant to show that there was such acquiescence on the part of the plaintiff, after knowledge of the mistake, as to render it inequitable to grant the relief asked. *Ib.*

DEMAND.

When Not Necessary.—A party who is brought into court at the suit of another is excused from making a demand which might be required if he were the moving party. *Stiz v. Sadler, 254*

DESCENT.

Son-in-Law.—Heir by Adoption.—Where a wife dies, without issue, prior to the death of her father, her husband, upon the death of the latter, does not inherit, as by adoption, the share of his estate which the law would have cast upon his wife had she survived her father.

Graham v. Babcock, 205

DESCRIPTION.

See ASSESSMENT OF DAMAGES; CITY, 2, 12, 14, 15; DRAINAGE, 6; INSURANCE; RAILROAD, 1; REAL ESTATE, ACTION TO RECOVER, 2.

DILIGENCE.

See CONTINUANCE, 2.

DISCHARGE FROM CUSTODY.

See HABEAS CORPUS.

DISCRETION.

See CRIMINAL LAW, 9, 25.

DISMISSAL OF ACTION.

See ATTACHMENT; BILL OF EXCEPTIONS, 1.

DRAINAGE.

1. *Judgment.—Pleading.*—Where an answer in bar of an action to recover a drainage assessment alleges facts showing that the drainage proceedings were void for non-compliance with the law in force at the time, a reply that the drain was established under a prior act which did not contain the requirements which had been violated, is bad where such act had been repealed before the proceedings were begun.

Phillips v. Lewis, 62

2. *Assessment.—Complaint to Enforce.*—In a suit for the collection of a drainage assessment, all that the complaint need show concerning the proceedings for the establishment of the ditch are, that some notice was given of the filing of the petition; that the petition was filed; that the commissioners reported the benefits and damages assessed; that the report was approved by the court, and that a copy of the

- assessment against the defendant is made part of the complaint. *Scott v. Brackett*, 89 Ind. 413, distinguished. *Lavery v. State, ex rel.*, 217
3. *Same.—Trial by Court.—Jury.*—Suits for the collection of drainage assessments are triable by the court and not by a jury. Section 4276, R. S. 1881, and the amendatory act of 1883, Acts 1883, p. 176; also, section 409, R. S. 1881. *Ib.*
 4. *Same.—Damages.—Set-Off.—Counter-Claim.*—Damages alleged to have been sustained by reason of the failure of the drainage commissioner to construct and complete the work as petitioned for, are not a proper subject of counter-claim or set-off by the defendant in a suit by such commissioner to enforce an assessment of benefits. *Ib.*
 5. *Complaint to Collect Assessment.—Must Show Notice of Filing Petition for Drain.*—A complaint to collect a drainage assessment is bad on demurrer unless it shows, either by averment or by exhibits properly constituting a part of it, that some notice was given of the filing of the petition for the establishment of the drain. *Kennedy v. State, etc.*, 236; *Whittaker v. State, etc.*, 600
 6. *Petition.—Highway.—Description.*—A petition for drainage is not bad for merely failing to give the name of the civil township in which a public highway, which it is alleged will be benefited, is situate. *Collins v. Rupe*, 340
 7. *Highway.—Assessment Against Township.—Enforcement by Mandate.*—A township may be assessed, in a drainage proceeding, for benefits to a highway, and when the assessment is properly made, payment may be enforced by mandate. *State, ex rel., v. Thompson*, 533

EASEMENT.

1. *Naked License.—Revocation.*—A mere naked license to pass over the lands of the licensor is revocable at the pleasure of the latter. *Parish v. Kaspere*, 586
2. *Same.—Prescription.—Claim of Right.*—There can be no title by prescription where the user is not under claim of right. *Ib.*
3. *Same.—User for Twenty Years.*—Where there is an uninterrupted user of a way for twenty years, under claim of title, an easement therein is established, even though the original claim was not well founded. *Ib.*
4. *Same.—Appurtenant Way.*—Where the owner of land annexes to part of it a right of way as appurtenant thereto, and then conveys the land to which the way is made an appurtenance, his grantees, near and remote, acquire an easement. *Ib.*

EJECTMENT.

See EVIDENCE, 11; REAL ESTATE, ACTION TO RECOVER.

ELECTIONS.

See JURISDICTION; MANDAMUS; TOWN.

1. *Laws to be Liberally Construed.*—Election laws are to be liberally construed when necessary to reach a correct result, and their provisions treated as directory rather than as mandatory. *Duncan v. Shenk*, 26
2. *Same.—Change of Precincts.—Statute Construed.*—Section 4687, R. S. 1881, prohibiting a change in the boundaries of election precincts by the county commissioners after the June term of the board next preceding any election, does not apply where the readjustment of a precinct becomes necessary on account of a change in the boundary line between townships. *Ib.*
3. *Same.—Change of Township Boundary.—Right to Vote.*—Where the boundary line of a township is changed by the county commissioners, at their December term next preceding the April election,

by the addition of territory taken from an adjoining township, the persons residing upon such territory, being otherwise legal voters, are entitled to vote at such election in the precinct into which they have been cast. *Ib.*

EMINENT DOMAIN.

See ASSESSMENT OF DAMAGES; MORTGAGE, 6; RAILROAD, 1.

EQUITY.

See DEED, 1, 5 to 12; MORTGAGE, 3, 4; NOTICE, 3; SUBROGATION; TRIAL, 2.

ESCAPE OF PRISONER.

See SHERIFF.

ESTATE OF ABSENTEE.

See PROMISSORY NOTE, 4.

ESTOPPEL.

See BAILMENT; CITY, 9; DEED, 9; INSURANCE; JUDGMENT, 4 to 6, 9 to 13; PROMISSORY NOTE, 3.

1. *City.—Street Improvement.—Contract.*—A property-owner can not quietly permit money to be expended on work which benefits his land, under a contract with a city, and then deny the power of the city to make the contract. *Taber v. Ferguson, 227*
2. *Mortgage.—Claim of Title.*—One who takes a mortgage of real estate is estopped to claim title thereto. *Voss v. Eller, 260*
3. *Pleading.*—To constitute an estoppel *in pais* there must be a showing that the party pleading it was induced to act to his injury by something said or done by the other, or that there was misrepresentation or concealment of a material fact on the part of the latter. *Baals v. Stewart, 371*
4. *Deed.—Decedents' Estates.—Widow.—Executor.*—Where a widow, as executrix, appoints an assistant, under a power given in the will, who alone applies for an order to sell real estate, but she joins in the deed, and in reporting it for confirmation, she is estopped from asserting, as against her grantees, that all the land was not sold. *Sims v. Gay, 501*

EVIDENCE.

See BILL OF EXCEPTIONS; CITY, 13; COUNTY, 2; CRIMINAL LAW, 1, 10, 11, 14, 15, 22; INTOXICATING LIQUOR, 2; MARRIED WOMAN, 2; MORTGAGE, 2; NEGLIGENCE, 4; PRACTICE, 1; RAILROAD, 13 to 15; REAL ESTATE, ACTION TO RECOVER, 2 to 4; SALE, 2; WITNESS.

1. *Receipt.—Contradiction by Parol.*—A receipt may be explained or contradicted by parol. *Adams v. Davis, 10*
2. *Privileged Communications.—Attorney.—Scrivener.*—Communications made to an attorney who is acting for both parties, and which are made in the presence of both, are not privileged, nor are communications made to an attorney acting as a scrivener. *Hanlon v. Doherty, 37*
3. *Same.—Witness.—Action by Executrix.*—In an action by an executrix upon a contract made with her testator by the defendant, the latter is not a competent witness. *Ib.*
4. *Same.—Exclusion.—Harmless Error.*—The exclusion of competent evidence is a harmless error where the result must have been the same had it been admitted. *Ib.*
5. *Same.—Establishment of Highway.—Validity of Proceedings.*—In an action against a county to recover for injuries caused by a defective bridge, evidence that the county commissioners assumed to establish the highway of which the bridge is a part, is competent, although it may appear that there are errors and irregularities in the proceedings.

The validity of such proceedings can not be inquired into in such case. *Board, etc., v. Montgomery, 69*

6. *Communications Between Husband and Wife.—Fraudulent Conveyance.—Consideration.—Statute Construed.*—In a suit against a husband and wife to set aside an alleged fraudulent conveyance from the former to the latter, the negotiations between them prior to the conveyance, relative to the consideration, are not incompetent under section 497, R. S. 1881, and are admissible in evidence. *Beitman v. Hopkins, 177*
7. *Patent.—Statutory Power to Convey.*—To authorize the admission in evidence of a patent issued by another State, ostensibly in pursuance of a statute authorizing a county to convey lands to the State, it must be shown that the lands described in the patent were within the provisions of the statute. *Wines v. Woods, 291*
8. *Same.—Tax Deed.—Law of Wisconsin.*—A tax deed under the laws of Wisconsin, being regular on its face, is presumptive evidence of the regularity of prior proceedings, and is *prima facie* proof of title in the grantee. *Ib.*
9. *Failure to Sustain Material Issue.—Reversal of Judgment.*—Where the evidence wholly fails to sustain the finding upon a material issue, the cause will be remanded for a new trial. *Roby v. Pipher, 345*
10. *Same.—Payment.*—For evidence held not sufficient to establish a plea of payment, see opinion. *Ib.*
11. *Ejectment.—Materiality.*—Evidence offered in an action of ejectment, by which it is proposed to show that all the matters in difference between the parties concerning the real estate in dispute had been compromised and adjusted, should be excluded where nothing has been shown as to the materiality of the proffered evidence, or the manner in which the alleged compromise was made. *Hall v. Durham, 434*
12. *Judgment.—Notice.—Jurisdiction.*—Where it does not appear that notice was not issued, but it does appear that jurisdiction was assumed and a final judgment rendered, such judgment is competent evidence. *Sims v. Gay, 501*

EXECUTION AGAINST BODY.

See JUDGMENT, 1 to 8.

EXECUTORS AND ADMINISTRATORS.

See CONTRACT; DECEDENTS' ESTATES; ESTOPPEL, 4; FRAUDULENT CONVEYANCE, 3.

Power to Release Maker of Promissory Note.—Under the law of this State an administrator has power, in good faith and upon a sufficient consideration, to release one of the makers of a promissory note, executed to him in his fiduciary capacity, from liability for the balance of the note remaining unpaid. *Latta v. Miller, 302*

EXEMPTION FROM EXECUTION.

See FRAUDULENT CONVEYANCE, 2.

EXHIBIT.

See ATTORNEY'S LIEN, 4; BILL OF EXCEPTIONS, 2; INJUNCTION, 2.

FALSE PRETENCES.

See CRIMINAL LAW, 27.

FENCE.

See RAILROAD, 8 to 12.

FIXTURE.

See NOTICE, 1, 2.

FORECLOSURE.

See MORTGAGE; TAX LIEN.

FORFEITURE.

See CONTRACT.

FORGERY.

See CRIMINAL LAW, 13 to 15.

FORMER ADJUDICATION.

See JUDGMENT, 4 to 6, 9 to 13.

FRAUD.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; CHATTEL MORTGAGE; EVIDENCE, 6; FRAUDULENT CONVEYANCE; JUDGMENT, 1 to 8, 13; SALE; SPECIAL FINDING, 4, 8; STATUTE OF FRAUDS; WILL, 6.

FRAUDULENT CONVEYANCE.

See EVIDENCE, 6.

1. *Husband and Wife.—Trust.*—Where, without his wife's consent, a husband takes the title to property purchased wholly with her money in his own name, a subsequent conveyance of it to her can not be set aside as fraudulent at the suit of a creditor of the husband. While the title is in the husband he holds it in trust for the wife, the equitable owner, and no act of his can enlarge his interest in the property.
Taylor v. Duesterberg, 165
2. *Same.—Exemption from Execution.—Judicial Sale.*—Where property alleged to have been fraudulently conveyed by a husband is beyond the reach of his creditors by reason of the exemption law and the law vesting absolutely the wife's inchoate one-third in the event of a judicial sale, a deed made by the husband with the intention of vesting the title in his wife, even though it be voluntary and without consideration, is not fraudulent as against creditors. *Ib.*
3. *Same.—Witness.—Suit by Administrator.*—In a suit by an administrator against a husband and wife to set aside an alleged fraudulent conveyance, the defendants are not excluded, by section 498, R. S. 1881, from testifying in their own behalf, that the property sought to be reached was purchased with the wife's money and the title taken in the name of the husband without her consent, and other matters relating to its purchase and improvement, although they occurred prior to the death of the decedent. *Ib.*

GAMBLING HOUSE.

See CRIMINAL LAW, 1.

GENERAL ASSEMBLY.

See JURISDICTION, 5.

HABEAS CORPUS.

Delay of Trial.—Application for Discharge from Custody.—Judgment.—Collateral Attack.—Upon the hearing of an application by a prisoner, under sections 1782 and 1784, R. S. 1881, to be discharged from custody on the ground that his trial has been delayed more than two terms without his consent, if it appears that the delay has been caused by any act of the applicant, it is the duty of the court to remand him, and the judgment in that proceeding is conclusive on *habeas corpus*.

McGuire v. Wallace, 284

HARMLESS ERROR.

See CONTINUANCE, 1; EVIDENCE, 4; SUPREME COURT, 8.

HIGHWAY.

See COUNTY; DRAINAGE, 6, 7; EVIDENCE, 5.

HUSBAND AND WIFE.

See CRIMINAL LAW, 21; DESCENT; EVIDENCE, 6; FRAUDULENT CONVEYANCE; MARRIED WOMAN; STATUTE OF FRAUDS; WILL, 15, 16.

INDICTMENT.

See CRIMINAL LAW.

INFANT.

See REAL ESTATE, ACTION TO RECOVER, 8; STATUTE OF LIMITATIONS.

INJUNCTION.

See ATTORNEY'S LIEN, 4; CITY, 14; JURISDICTION.

1. *City.—Street Improvement.—Collection of Unauthorised Assessment.*—Injunction will lie to restrain the collection of an assessment for a street improvement levied upon property which the city had no power to assess for such improvement. *Balfe v. Lammers, 347*
2. *Sheriff's Sale.—Pleading.—Exhibit.*—A judgment debtor may enjoin a threatened sale of his property under a judgment which is paid, except as to the amount of liens for attorney's fees which he holds by assignment, and a copy of the assignment need not be filed with the complaint for injunction. *Day v. Rowman, 333*

INSANITY.

See DEED, 5 to 8.

Practice.—Medical Examination of Party.—Where one of the questions at issue is as to the sanity or insanity of one of the parties at a certain time, it is not error for the court to refuse a request of the opposite party, made during the trial, to have such party put in charge of physicians for the purpose of having an examination as to her mental condition, there being no offer to show that her condition was substantially the same as at the time in question. *Hull v. Louth, 315*

INSTRUCTIONS TO JURY.

See CRIMINAL LAW, 12, 23, 29, 30; RAILROAD, 12.

1. *Exceptions.—Bill of Exceptions.—Practice.*—Where instructions upon which error is sought to be predicated are made part of the record by a bill of exceptions, what occurred in the way of exceptions to the giving or refusal of such instructions, must be stated in the bill as facts, and be authenticated by the signature of the judge. *McKinsey v. McKee, 209*
2. *Verdict.—When Court May Direct.*—It is not error for the court to instruct the jury what their verdict shall be, where the controlling facts are admitted, or are not controverted in any essential respect. *Hall v. Durham, 434*

INSURANCE.

See CONTRACT.

1. *Personal Property.—Misdescription of Location.—Reformation.*—Where the agent of an insurance company, without the knowledge or consent of the insured, inserts a false description of the location of personal property in the application, thereby causing a misdescription in the policy, these facts, in an action on the policy, may be averred and proved without asking a reformation of either instrument. *Phenix Ins. Co. v. Allen, 273*
2. *Same.—Estoppel.*—In such case the insurance company is estopped from setting up the misdescription as a defence to the action. *Id.*

INTOXICATING LIQUOR.

See CITY, 16 to 18.

1. *Druggist.—Physician.—Sale on Sunday.—Written Prescription.*—A sale of intoxicating liquor on Sunday, by a druggist, without a written prescription, is an offence under section 2099, R. S. 1881, although the druggist is himself a physician. *Tilford v. State, 359*
 2. *Sale on Sunday.—Evidence.*—The appellant kept a hotel, to which a saloon, owned by him, was attached. It was separated from the hotel office by a hall, from which doors opened into each. The prosecuting witness entered the office on Sunday and passed through the hall into the saloon. The appellant was not present, nor did the witness see him about the premises, but one of his boarders and two or three other persons were in the saloon, standing some distance from the bar. The witness asked the boarder if he had any beer, and the latter replied: "There is a bottle; why don't you take it?" A bottle of beer and a beer glass were on the counter. The witness poured out a glass of beer, drank it, left the price of the drink on the counter and passed out by the way he had entered.
- Held*, that the evidence is sufficient to sustain a verdict finding the appellant guilty of an unlawful sale on Sunday.
- Held*, also, that the conversation between the prosecuting witness and the boarder was properly admitted in evidence. *Pierce v. State, 535*

JUDGMENT.

See ATTORNEY'S LIEN; CITY, 15; COUNTY, 2; DRAINAGE, 1; EVIDENCE, 9, 12; HABEAS CORPUS; JURISDICTION, 3; NOTICE, 3; SUBROGATION; TRIAL, 1.

1. *Avoiding Payment.—Fraud.—Imprisonment.*—Section 22 of article 1 of the Constitution authorizes imprisonment for fraud practiced in avoiding the payment of judgment debts. *Baker v. State, ex rel., 47*
2. *Same.—Execution Against Body.—Affidavit.*—Before an execution against the body of a debtor can be issued for fraud in avoiding the payment of a judgment, it must be made to appear by the affidavit or verified complaint, that the amount due upon the judgment can not be collected by an ordinary execution against the property of the debtor. *Ib.*
3. *Same.—Civil Action.*—A proceeding supplemental to execution, and a proceeding to procure an execution against the body of a debtor, are civil actions within the meaning of the civil code. *Ib.*
4. *Same.—Former Adjudication.—Estoppel.*—A judgment in favor of the debtor in a proceeding supplemental to execution, although it is erroneous, is a bar to a subsequent proceeding for an execution against his body, where the questions of fact and the object sought in the two cases are the same. *Ib.*
5. *Same.—Form of Actions.*—It is not necessary to an estoppel by judgment that the former action was the same in form as that in which the adjudication is pleaded. *Ib.*
6. *Same.—Cause of Action.—When the Same.*—The right of the plaintiff, and the obligation, duty or wrong of the defendant, constitute the cause of action, and the cause of action is the same where the same evidence will support both actions. *Ib.*
7. *Same.—Money in Possession of Debtor.—Proceedings Supplemental to Execution.*—Money in the possession of the judgment debtor, which he refuses to surrender in payment of the judgment, may be reached by proceedings supplemental to execution. *Wallace v. Lawyer, 54 Ind. 501, criticised. Ib.*
8. *Same.—"Property."—Meaning of Word.*—The word "property," as used in the statute providing for proceedings supplemental to execution,

embraces every species of things in which there may be an ownership and which may be made available in the payment of judgments, including money. *Ib.*

9. *Former Adjudication.—Irregularities.—Estoppel.—Pleading.*—Where an answer pleads a former adjudication of the matters in issue, a reply attacking the validity of the judgment in the former action, on the ground of mere irregularities and errors which are not sufficient to render it void, is bad. *Phillips v. Lewis, 62*
10. *Same.—Presumption of Regularity of Judgment.*—Where a former adjudication is pleaded, it will be presumed, in the absence of an affirmative showing to the contrary, that the record of such adjudication is regular and free from error. *Ib.*
11. *Review of.—Conclusiveness of Order Granting.—Appeal.—Pleading.*—A judgment granting a review of a judgment rendered upon the sustaining of a demurrer to a complaint, is, if not appealed from, conclusive as to the sufficiency of both the complaint for review and the complaint in the former case. *Board, etc., v. Montgomery, 69*
12. *Collateral Attack.*—A judgment, regular on its face and one which the court had jurisdiction to render, can not be attacked collaterally. *Hall v. Durham, 434*
13. *Collateral Attack.*—A party against whom an unauthorized or inequitable judgment has been obtained, whether by fraud or mistake, can not treat the judgment as invalid, until he has taken some proceedings known to the law to set it aside, or to secure its modification. *Weiss v. Guerinneau, 438*

JUDICIAL KNOWLEDGE.

See REAL ESTATE, ACTION TO RECOVER, 2.

JUDICIAL SALE.

See FRAUDULENT CONVEYANCE, 2; INJUNCTION, 2; REAL ESTATE, ACTION TO RECOVER, 2.

JURISDICTION.

See EVIDENCE, 12.

1. *Injunction.—Election Returns.—Alleged Illegality.—Custodian.—Secretary of State.—Speaker of House of Representatives.*—The courts have no jurisdiction of a suit to enjoin the secretary of state from delivering to the Speaker of the House of Representatives the sealed returns, alleged to be wrongful and illegal, of an election for Lieutenant-Governor, which are directed to the Speaker, as required by law, in care of the secretary, and are to be delivered to him by the latter. *Smith v. Myers, 1*
2. *Same.—Jurisdiction of Subject-Matter.—Consent of Parties.*—Jurisdiction over the subject-matter must be given by law; it can not be conferred by consent of the parties. *Ib.*
3. *Judgment.*—Jurisdiction of the subject-matter and of the person is essential to the validity of all judicial judgments, and where there is no jurisdiction the court will not express an opinion upon the merits of the controversy. *Robertson v. State, ex rel., 79*
4. *Same.—Quo Warranto.—Office.—Civil Action.*—An information in the nature of a *quo warranto* to settle the title to a public office is a civil action, and, under section 312, R. S. 1881, must be filed in the county where the defendant has his last and usual place of residence. *Ib.*
5. *Same.—Constitutional Law.—Lieutenant-Governor.—Contested Election.*—A claimant of the office of Lieutenant-Governor can not maintain an information in the nature of a *quo warranto* to settle the title to that office, as section 6 of article 5 of the Constitution vests exclusive jurisdiction of such controversies in the General Assembly. *Ib.*

6. *Presumption*.—Where the record is silent, jurisdiction will be presumed. *Sims v. Gay*, 501

JUROR.

1. *Examination*.—*Supreme Court*.—*Practice*.—The Supreme Court will not pass upon a rejected question, propounded to a person called as a juror, touching his competency, unless the entire examination of such juror is set out in the record, in order that it may be shown whether any injury was done. *Indianapolis, etc., R. W. Co. v. Pitzer*, 179
2. *Misconduct*.—*Practice*.—*Hearing on Affidavits*.—*Supreme Court*.—Where a question as to the misconduct of a juror is presented by affidavits and counter-affidavits, the decision of the trial court thereon will not be disturbed on appeal. *Dill v. Lawrence*, 564

JURY.

See INSTRUCTIONS TO JURY; JUROR.

JUSTICE OF THE PEACE.

See CRIMINAL LAW, 16; RAILROAD, 9.

LEGISLATURE.

See CITY, 17; JURISDICTION, 5; MEDICINE AND SURGERY, 1, 4.

LICENSE.

See CITY, 16 to 18; EASEMENT, 1; MEDICINE AND SURGERY; NOTICE, 1, 2.

LIEN.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 2 to 4; ATTORNEY'S LIEN; CHATTEL MORTGAGE; INJUNCTION, 2; JUDGMENT; MECHANIC'S LIEN; MORTGAGE; TAXES; TAX LIEN.

LIEUTENANT-GOVERNOR.

See JURISDICTION, 1 to 5.

LIMITATION OF ACTIONS.

See STATUTE OF LIMITATIONS.

LIS PENDENS.

See ABATEMENT; REAL ESTATE, ACTION TO RECOVER, 1.

MALICIOUS TRESPASS.

See CRIMINAL LAW, 17, 18.

MANDAMUS.

See DRAINAGE, 7; SCHOOL FUNDS, 2.

Return.—*Taxes in Aid of Railroad*.—*Reinstatement on Duplicate*.—*Agreement to Accept Less than Full Amount*.—*Election Expenses*.—Upon a petition for a mandate to compel county commissioners to reinstate on the duplicate taxes assessed in favor of a railroad company, a return showing that in a prior proceeding the beneficiaries of the tax had agreed to accept a certain sum, if paid within sixty days, in full satisfaction of all claims on account of such tax, and that each taxpayer who should pay his proportion of such sum should be entitled to a receipt in full, and further showing that such per cent. had been collected from all who paid within sixty days, and from all others the full amount assessed against them, which had been paid over to the beneficiaries, excepting only the expenses of the election, is good, even though the withholding of the election expenses was wrongful.

Board, etc., v. State, ex rel., 596

MARRIED WOMAN.

See FRAUDULENT CONVEYANCE; REAL ESTATE, ACTION TO RECOVER, 8;
STATUTE OF FRAUDS; STATUTE OF LIMITATIONS.

1. *Promissory Note.—Consideration.—Principal and Surety.—Pleading.—*Where, in an action against a married woman, on a promissory note, she answers her coverture, and that she executed the note as surety for a co-defendant, a reply that the consideration of the note was personal property purchased by her for use in her separate business, is good, without alleging that the property was delivered to or received by her.
Chandler v. Spencer, 553
2. *Same.—Purchase of Personal Property.—Delivery to Third Person.—Evidence.—*For evidence held sufficient to sustain a finding against a married woman, holding her liable as principal upon a promissory note executed for personal property contracted for and delivered to another, see opinion.
Ib.

MEASURE OF DAMAGES.

See SHERIFF.

MECHANIC'S LIEN.

1. *Notice.—Act of 1883.—Section 5 Construed.—*Under section 5 of the act of March 6th, 1883 (Acts of 1883, p. 140), concerning mechanics' liens, a verbal notification to the owner or his agent that material is being furnished to or work performed for the contractor, is sufficient to enable a material man or mechanic to acquire a lien.
Vinton v. Builders, etc., Ass'n, 351
2. *Same.—Word "Notify."—Meaning of.—*The word "notify," used in such section, never imports or implies, of necessity, a notice in writing, and such notice will not be required unless it is clear that it was so intended.
Ib.

MEDICAL EXAMINATION OF PARTY.

See INSANITY.

MEDICINE AND SURGERY.

1. *Regulating Practice of.—Constitutional Law.—Police Power.—*The Legislature has power to regulate the practice of medicine and surgery, and to prescribe the qualifications of applicants for license.
Eastman v. State, 278
2. *Same.—License.—County Clerk.—Judicial Power.—*The power conferred upon the county clerk to accept or reject an application for license is not a judicial one.
Ib.
3. *Same.—Exceptions to Statute.—When will not be Created.—*The courts can not create exceptions to a statute where its words are free from ambiguity and its purpose plain.
Ib.
4. *Same.—Wisdom of Statute.—*The wisdom or expediency of a statute is a question solely for the Legislature.
Ib.

MERGER.

See MORTGAGE, 3, 4.

MISTAKE.

See CITY, 14; DEED, 9 to 12; INSURANCE; JUDGMENT, 13; PROMISSORY NOTE, 4.

MORTGAGE.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 2 to 4; CHATTEL MORTGAGE; DEED, 5; ESTOPPEL, 2; NEW TRIAL; NOTICE, 2, 3; QUIETING TITLE;

REAL ESTATE, ACTION TO RECOVER, 1, 2; SCHOOL FUNDS, 3; STATUTE OF FRAUDS; TAX LIEN, 2; TRIAL, 2.

1. *When Deed Is.*—Although a deed is absolute on its face, it is only a mortgage if executed to secure an existing debt. *Hanlon v. Doherty*, 37
2. *Same.—Release.—Consideration.—Evidence.*—A release may be shown to be without consideration. *Ib.*
3. *Same.—Equity.—Merger.—Extinguishment.—Deed.*—Where the holder of a purchase-money mortgage, after a second mortgage upon the land has been executed to a third person, extends the time of payment of the amount due on his mortgage, and as a security accepts a deed to the land absolute on its face, and subsequently, without consideration and with no intention of releasing his lien, releases his mortgage of record, such mortgage will be kept alive in order that he may not lose the priority of his lien. *Ib.*
4. *Same.—Uniting of Two Estates in Mortgage.—When Mortgage not Merged.*—Even when the fee in the mortgaged property has been vested in the mortgagee by a conveyance from the mortgagor, and the mortgage has been released, it will still be upheld whenever it is for the interest of the mortgagee, by reason of some intervening title or other cause, that it should not be regarded as merged. *Ib.*
5. *When Deed and Contemporaneous Contract Constitute a Mortgage.—Conditional Sale.*—Where, upon construing together a deed absolute on its face and a contemporaneous written contract, it appears that at the time they were executed there was a pre-existing debt owing to the grantee, the subsequent payment of which by the grantor would entitle him to a reconveyance of the property, and that the grantee surrendered no remedy previously available to him for the collection of his debt, and that the obligation of the grantor remained the same, such deed and contract constitute a mortgage, and not a conditional sale. *Voss v. Eller*, 260
6. *Eminent Domain.—Taking Mortgaged Property for Street.—Mortgagee Entitled to Damages Awarded.*—The mortgagee of land which is taken by a city for a public street is an owner within the meaning of the statute governing condemnation proceedings, and may recover from the city the damages awarded, notwithstanding the amount has already been paid to the mortgagor. *Sherwood v. City of Lafayette*, 411
7. *Promissory Note.—Trustee.—Agency.—Church.—Pleading.*—Where a note and mortgage are executed by several persons, without anything to show that they are acting as trustees or agents, or in any official or representative character, such note and mortgage are the obligations of the several makers; but where it is alleged in a complaint thereon that a church organization, which is made a defendant, being in debt and having an unfinished building, applied to the plaintiff through such persons, as its trustees and agents, for a loan, that the loan was made to and the money received by the church and applied to the payment of its debts and the completion of its building, and that the sum loaned is due and unpaid, a cause of action is stated against the church. *Second Baptist Church v. Furber*, 492

MUNICIPAL CORPORATION.

See CITY; COUNTY; DEDICATION; QUO WARRANTO; TOWN.

NAME.

See PLEADING, 1.

NEGLIGENCE.

See DECEDENTS' ESTATES; RAILROAD, 2 to 7; TELEGRAPH COMPANY.

1. *County.—Bridges.—Liability for Negligence.*—Counties are liable

for injuries caused by negligence in constructing or maintaining bridges.
Board, etc., v. Montgomery, 69

2. *Complaint.—Sufficiency After Verdict.*—Where a complaint alleges facts from which negligence may be inferred, it is good after verdict, although the word "negligence" is not used in characterizing the conduct of the defendant. *Ib.*
3. *Same.—Damages.*—The responsibility of a wrong-doer for consequential damages resulting from his act, is the same in cases of actionable negligence as in cases of wilful or malicious torts.
Indianapolis, etc., R. W. Co. v. Pitzer, 179
4. *Pecuniary Condition of Parent.—Attendants for Children.*—The pecuniary condition of the parent, and his inability to employ servants to take care of his children, are not proper subjects for consideration by the jury in an action by him for negligently causing the death of a child. *Ib.*

NEW TRIAL.

See PRACTICE, 2; SUPREME COURT, 4, 5.

As of Right.—Cancellation of Mortgage.—Quieting Title.—A new trial as of right is not allowable in a suit to have a deed adjudged to be a mortgage and to procure its cancellation, as satisfied, even though the complaint also prays for a quieting of title. *Voss v. Eller, 260*

NOTES AND BILLS.

See PROMISSORY NOTE.

NOTICE.

See CITY, 6 to 9; DEED, 3, 5, 7; DRAINAGE, 2, 5; EVIDENCE, 12; MECHANIC'S LIEN.

1. *Contract.—Real Estate.—License.—Assignment.*—An agreement, by which a party is to have certain land, "to hold and use as his own as long as he keeps a mill upon it and keeps the same in running order," is a mere naked license, creating no freehold estate in the land, and an assignee of the instrument is chargeable with notice of the nature of the interest assigned. *Mulott v. Price, 22*
2. *Same.—Personal Property.—Mill.—Chattel Mortgage.—Innocent Purchaser.*—The mill, by the terms of the agreement, being treated as personal property by the owner of the freehold and his licensee, an assignee of the instrument, notwithstanding the mill is a permanent structure, annexed to the real estate, is bound to know of its liability to be encumbered by chattel mortgage, and can not claim to be an innocent purchaser as against such a mortgage executed thereon by his assignor and properly recorded. *Ib.*
3. *Commissioner's Deed.—Recitals.—Inquiry.—Mortgage.—Outstanding Equities.—Partition.*—The deed of a commissioner in partition, which gives the title of the cause and recites that it is made in pursuance of an order and judgment of court therein, "entered in Record No. 11, of the records of said court, on page 381," is sufficient to put subsequent purchasers or mortgagees from the grantee upon inquiry as to the character, extent and contents of the order and judgment, and as to all matters affecting his title which such record would disclose, and with respect to equities in favor of third persons, which might thus have been discovered, they can not be deemed innocent purchasers. *Singer v. Scheible, 575*

OCCUPYING CLAIMANT.

See PARTITION, 1.

OFFICE AND OFFICER.

See JURISDICTION, 1 to 5; QUO WARRANTO.

PARENT AND CHILD.

See DEED, 11; NEGLIGENCE, 4.

PARTITION.

See NOTICE, 3.

1. *Improvements.—Occupying Claimant.*—Where one is in possession of land under color of title, and makes, in good faith, lasting and valuable improvements thereon, he is entitled to have their value taken into account in awarding partition, although made without the knowledge or consent of his co-tenant. *Carver v. Coffman, 547*
2. *Same.—Rents and Profits.—Liability of One Co-tenant to Another.*—Where one co-tenant is in possession of the whole of the common property, denying the other co-tenant's title, and excluding him from possession and from participation in the income of the property, he is liable to the latter for all profits he has received in excess of his just proportion. *Ib.*

PARTNERSHIP.

See CHATTEL MORTGAGE.

PATENT.

See EVIDENCE, 7.

PAYMENT.

See EVIDENCE, 10; SUBROGATION.

Payment of Less Sum will not Discharge Greater.—Extent of Rule.—The rule that the payment of a less sum will not discharge a greater, only applies where the sum is liquidated, and is due upon contract. It can not apply to a claim founded upon a statutory proceeding assessing a tax in aid of a railroad corporation.

Board, etc., v. State, ex rel., 596

PENALTIES.

See PRINCIPAL AND SURETY; TELEGRAPH COMPANY.

PERSONAL PROPERTY.

See BAILMENT; CONVERSION; INSURANCE; MARRIED WOMAN; NOTICE, 1, 2; SALE; WILL, 3, 4.

PHYSICIANS AND SURGEONS.

See MEDICINE AND SURGERY.

PLEADING.

See ABATEMENT; ASSESSMENT OF DAMAGES; ATTORNEY'S LIEN, 2, 4; CHATTEL MORTGAGE, 4; CITY, 7, 14; CONVERSION; CRIMINAL LAW; DRAINAGE; ESTOPPEL, 3; INJUNCTION, 2; JUDGMENT, 9, 11; MARRIED WOMAN, 1; MORTGAGE, 7; NEGLIGENCE, 2; PROMISSORY NOTE, 1; QUIETING TITLE; QUO WARRANTO; REAL ESTATE, ACTION TO RECOVER, 1; SUPREME COURT, 2, 3, 8; TAX LIEN, 1; TOWN.

1. *Complaint.—Name.—Initial Letters.—Decedents' Estates.—Practice.*—The fact that only the initial letters of the Christian name of the plaintiff are given in a claim against a decedent's estate is not such a defect as warrants the reversal of the judgment, where there is no demurrer or assignment of error questioning the sufficiency of the complaint. *Cummins v. Peed, 71*

2. *Practice.—Waiver of Ruling on Demurrer.*—If the defendant answers before his demurrer to the complaint is disposed of, he waives a ruling on the demurrer. *Ludlow v. Ludlow, 199*

3. *Striking Out.—Bill of Exceptions.—Practice.—Supreme Court.*—To present any question on appeal, upon a ruling striking out a pleading, such

pleading must be brought back into the record either by a bill of exceptions or an order of the court. *Laverty v. State, ex rel., 217*

4. *Reply.—Sufficiency of.—Demurrer.*—A reply, to be sufficient on demurrer, must be good as to the entire answer to which it is addressed. *Silvers v. Canary, 267*

PLEDGE.

See SCHOOL FUNDS, 1, 2.

PRACTICE.

See ATTACHMENT; BILL OF EXCEPTIONS; CONTINUANCE; CRIMINAL LAW; EVIDENCE, 9; INSANITY; INSTRUCTIONS TO JURY; JUROR; NEW TRIAL; PLEADING; SPECIAL FINDING; SUPREME COURT; TRIAL.

1. *Objection to Evidence.*—A general objection to the admission of evidence presents no question on appeal. *McKinsey v. McKee, 209*
2. *Exception to Opinion Instead of Decision.—New Trial.—Criminal Law.*—An exception to the *opinion* of the court in overruling a motion for a new trial, instead of to its *decision*, which is more technically accurate, is sufficient to present the question. *Pierce v. State, 535*

PREFERENCE OF CREDITOR.

See ASSIGNMENT FOR BENEFIT OF CREDITORS.

PRESCRIPTION.

See EASEMENT.

PRESIDENT OF THE SENATE.

See SMITH v. MYERS, 1; ROBERTSON v. STATE, *ex rel.*, 79.

PRESUMPTION.

See CITY, 3; CRIMINAL LAW, 16; JUDGMENT, 10; JURISDICTION, 6; SPECIAL FINDING, 3; SUPREME COURT, 4; TAXES, 3, 5; TOWN, 2.

PRINCIPAL AND AGENT.

See INSURANCE; MECHANIC'S LIEN; MORTGAGE, 7.

PRINCIPAL AND SURETY.

See MARRIED WOMAN.

1. *Bond for Performance of Work.—Damages.—Penalty.*—The sureties in a bond given to secure the performance of work undertaken by their principal are liable for the actual damages sustained by the obligee, but not for a penalty which the principal separately agrees to forfeit in case he fails to perform the work as stipulated. *Dill v. Lawrence, 564*
2. *Same.—Liquidated Damages.*—The law ordinarily regards a general sum stated in a bond as a penalty, and will allow a recovery only for actual damages. If the sum is fixed as liquidated damages it must so appear, either from the intent of the parties as expressed in the entire instrument, or from express words. *Id.*

PRIVILEGED COMMUNICATIONS.

See EVIDENCE, 2.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

See JUDGMENT, 1 to 8.

PROMISSORY NOTE.

See MARRIED WOMAN; MORTGAGE, 7.

1. *Pleading.—Complaint.—Anticipated Defence.—Release of Maker Endorsed Thereon.*—Where a complaint counts upon a promissory note, and the

anticipated defence to the note is a written release of the maker so endorsed on the note as to become in some sense a part of the cause of action, the plaintiff may state in the complaint the anticipated defence and the facts intended to show that it is invalid; but if the facts stated in avoidance of the defence are not sufficient for that purpose, the complaint is bad on demurrer. *Latta v. Miller, 302*

2. *Administrator.—Power to Release Maker of Promissory Note.*—Under the law of this State an administrator has power, in good faith and upon a sufficient consideration, to release one of the makers of a promissory note, executed to him in a fiduciary capacity, from liability for the balance of the note remaining unpaid. *Id.*

3. *Capacity of Payee to Endorse.—Warranty.—Estoppel.*—The maker of a note negotiable under the law merchant warrants the capacity of the payee to transfer it in the usual course of business, and can not, by asserting the contrary, defeat it in the hands of a good-faith holder. *Wolke v. Kuhne, 313*

4. *Consideration.—Conveyance.—Failure of Title.—Quitclaim Deed.—Mutual Mistake of Fact.—Estate of Absence*—A father abandoned his family and property and left the State, his whereabouts being unknown to them for six years. Five years after his disappearance, both believing him to be dead, a daughter conveyed to a brother, by quitclaim deed, her interest in the real estate, the latter paying a part of the consideration in money and giving his promissory note for the balance. The father subsequently returned, excluded his son from possession of the land, and sold it. Action by the daughter on the note, and an answer by the defendant setting up the facts, and tendering a deed to the land conveyed.

Held, that the answer states a good defence.

Fleetwood v. Brown, 567

PROSECUTING ATTORNEY.

See CRIMINAL LAW, 9, 19, 31, 32.

QUIETING TITLE.

See DEED, 5; NEW TRIAL.

Cross Complaint.—Tax Deed.—Mortgage.—In a suit to foreclose a mortgage, a cross complaint by a defendant, alleging that he is the owner of the mortgaged property under a tax deed, pursuant to a sale antedating the mortgage, and that the other parties to the suit each claim an interest adverse to his title, is sufficient under section 1070, R. S. 1881.

Ludlow v. Ludlow, 199

QUO WARRANTO.

See JURISDICTION, 3 to 5; TOWN.

Legality of City Organization.—Quo Warranto by Private Citizen.—Sufficiency of Information.—An information in the nature of a quo warranto by a private citizen, to test the legality of a city organization, must show (1) that the relator is interested in the subject-matter, (2) that he did not by his vote, or otherwise, concur in the proceedings of which he complains, and (3) that, where there is no fraud or intentional violation of law, no public or private interest will be seriously affected by the granting of the relief demanded. *State, ex rel., v. Town of Tipton, 73*

RAILROAD.

See ASSESSMENT OF DAMAGES; MANDAMUS; NEGLIGENCE, 3, 4.

1. *Appropriation Proceedings.—Description.—Action to Recover.*—Where, in a proceeding by a railroad company to appropriate land, the description in the instrument of appropriation is sufficient to indicate to the owner the land wanted, the latter can not, after having appeared

in the condemnation proceedings without making any objection to the description, maintain an action to recover the land.

St. Joseph, etc., Co. v. Cincinnati, etc., R. W. Co., 172

2. *Negligence.—Permitting Child to Enter Train.*—The mere fact that a child of tender years is permitted by the persons in charge of a passenger train to enter it at a regular station, is not in itself sufficient to charge the railroad company with negligence.

Indianapolis, etc., R. W. Co. v. Pitzer, 179

3. *Same.—Intruder.—Care Required Respecting Child.*—The conductor of a train, upon which a child seven years old has become an intruder, is bound to use greater care in dealing with such child than is required respecting older persons. *Ib.*
4. *Same.—Trespassing Child.—Duty of Trainmen.*—Where a young child is seen upon the track by the persons in charge of a train, more care is required than in the case of one who has reached the age of discretion. There is no presumption that it will heed signals of danger, and the engineer is bound to stop the train, if he sees that the child makes no attempt to leave the track. *Ib.*

5. *Same.—Liability of Comptny.*—A boy seven years old, without the fault of his parents, wandered to a railroad station, entered a passenger train and was carried to a distant station, where the conductor put him off, leaving him in charge of no one, and giving no instructions concerning him. The child, left to himself, went upon the track, at a place near a highway crossing, where he could be seen for three-fourths of a mile by persons in charge of a train coming from the south. A freight train moving northward, in the daytime, on an ascending grade, where it could easily have been stopped had an effort been made to do so, ran upon and killed the child.

Held, that the railroad company is liable.

Ib.

6. *Same.—Damages.*—The responsibility of a wrong-doer for consequential damages resulting from his act, is the same in cases of actionable negligence as in cases of wilful or malicious torts. *Ib.*
7. *Same.—Pecuniary Condition of Parent.—Attendants for Children.*—The pecuniary condition of the parent, and his inability to employ servants to take care of his children, are not proper subjects for consideration by the jury in an action by him for negligently causing the death of a child. *Ib.*

8. *Action for Stock Killed.—Fence.—Burden of Proof.*—When it is shown, in an action by the owner against a railroad company to recover the value of a horse, that at the point where the animal went upon the track and was killed, the road was not securely fenced, the burden is then upon the defendant to show, in order to escape liability, that at that point it was not bound to maintain fences.

Cincinnati, etc., R. W. Co. v. Parker, 235

9. *Same.—Venue.—Justice of Peace.*—Such an action may be brought before any justice of the peace in the county where the animal is killed. *Ib.*
10. *Liability for Animals Killed.—Fence.—Station Grounds and Sidings.*—A railroad company is not required to fence its track at stations and sidings where freight or passengers are received or discharged, and are not liable to pay for animals which enter upon the track at such places and are killed, without negligence on the part of the company.

Indiana, etc., R. W. Co. v. Quick, 295

11. *Same.*—The material question in such cases is the condition of the road at the place where the animals enter upon the track, and not at the place where they are killed. *Ib.*
12. *Fence.—Stations and Sidings.—Liability for Animals Killed.—Instruction*—A railroad company is not required to fence its track at stations or

- sidings where freight is received and discharged, and is not liable for killing animals which enter upon its track at such places, and it is error to refuse to so instruct the jury where there is evidence to which such an instruction is applicable. *Indiana, etc., R. W. Co. v. Sawyer, 342*
13. *Common Carrier.—Evidence.—Bill of Lading.—Parol Agreement to Forward by Particular Line.*—Where a shipper accepts a bill of lading which designates no route by which the consignment is to be forwarded after reaching the terminus of the contracting company's line, it is not competent to prove a prior parol agreement to forward by a particular line. *Snow v. Indiana, etc., R. W. Co., 422*
 14. *Same.—When First Carrier May Select Forwarding Line.—Contract.—Provisions Supplied by Law.—Contradiction by Parol.*—The shipper, in such case, authorizes the first carrier to select any usual or reasonably direct and safe route by which to forward the consignment beyond its line, and this provision, being imported into the contract by law, is as unassailable by parol as the express terms of the contract. *Ib.*
 15. *Same.—Breach of Common Law Duty.—Evidence.*—Where it appears that goods were received for shipment under a written contract set up in one paragraph of complaint, there can be no recovery under another paragraph counting on a breach of the carrier's common law duty, and evidence of a parol agreement is not admissible under the latter paragraph. *Ib.*
 16. *Obstruction of Water-Flow.—Surface-Water.—Liability to Land-Owner.*—A railroad company is not liable to a land-owner for injuries caused by the accumulation of surface-water on his premises, by reason of the construction of embankments on its right of way. *Hill v. Cincinnati, etc., R. W. Co., 511*

RATIFICATION.

See CITY, 11.

REAL ESTATE.

See ASSESSMENT OF DAMAGES; DEED; EASEMENT; ESTOPPEL, 1, 2, 4; EVIDENCE, 6 to 8, 11; FRAUDULENT CONVEYANCE; MORTGAGE; NOTICE; PARTITION; PROMISSORY NOTE, 4; RAILROAD, 1, 16; REAL ESTATE, ACTION TO RECOVER; STATUTE OF FRAUDS; TAXES; TAX LIEN; WILL.

REAL ESTATE, ACTION TO RECOVER.

See EVIDENCE, 11; RAILROAD, 1.

1. *Answer in Abatement.—Foreclosure of Mortgage.—Review of Judgment.—Appeal.—Pending Action.*—An answer to a complaint in ejectment, which alleges that the plaintiff's right to recover is based upon a decree of foreclosure; that within a year from the rendition of such decree the defendant therein brought proceedings in the proper court for a review of such judgment and decree; that the court in such proceedings decided adversely to defendant and rendered judgment against him therein; that the defendant had prayed an appeal from such judgment last named, filed an appeal bond, and directed the clerk to make a transcript, which he intended to file in the office of the clerk of the Supreme Court, upon its completion, and praying that the proceedings be held in abeyance until his proposed appeal should be decided, is insufficient for any purpose. *Bryan v. Scholl, 367*
2. *Same.—Evidence.—Sheriff's Sale.—Description of Real Estate.—Omission of County.—Judicial Knowledge.*—Where the plaintiff in an ejectment suit derives his title from a sheriff's deed, on decree in foreclosure proceedings, it is competent for him to introduce in evidence the decree, the certified copy thereof issued to the sheriff and the notice of sheriff's sale, although neither of them recites in terms that the land

therein described is situate in the county where the proceedings were had; it appearing from the complaint, and the mortgage exhibited therewith, that the land was in such county, and the documents offered in evidence containing a proper description of such land by township and range, which brings the location thereof within the judicial knowledge of the court. *Ib.*

3. *Title.—Evidence.—Burden on Plaintiff.*—The burden is upon the plaintiff in ejectment to make out his title and right of possession by affirmative proof. *Roots v. Beck, 47.*
4. *Same.—When Burden on Defendant* —Where the defendant in ejectment pleads in confession and avoidance, and there is a reply in denial, the burden is on him as to the affirmative matter. *Ib.*
5. *Same.—Adverse Possession.—Color of Title.*—Open, notorious, exclusive, uninterrupted and adverse possession, continued for twenty years, without color of title, will confer a complete title, in all respects equal to a conveyance in fee. *Ib.*
6. *Same.—Statute of Limitations.*—The only distinction between titles acquired under the statute of limitations by adverse possession under color of title, and without it, is, that in the latter case title will be limited to actual, visible, continued occupancy, while in the former it may by construction embrace lands only part of which is actually occupied. *Ib.*
7. *Color of Title.—Void Judicial Proceeding.*—A judicial proceeding under which possession is taken, although void, will constitute color of title. *Sims v. Gay, 501*
8. *Same.—Statute of Limitations.—Disability.—Infancy.—Marriage.*—Where the statute of limitations begins to run during infancy, it is not stayed by a marriage during non-age, nor the time for bringing the action extended by the intervention of the latter disability. *Ib.*

RECEIPT.

See EVIDENCE, 1.

REFORMATION OF WRITTEN INSTRUMENT.

See DEED, 9 to 12; INSURANCE, 1.

RELEASE.

See EXECUTORS AND ADMINISTRATORS; MORTGAGE, 2 to 4; PROMISSORY NOTE, 1, 2.

RENTS.

See PARTITION; TAX LIEN, 1.

REPEAL OF STATUTE.

See TAXES, 1, 2.

REPLEVIN.

See CONVERSION; TAXES, 6, 8.

RES ADJUDICATA.

See JUDGMENT, 4 to 6, 9 to 13.

RESCISSION.

See DEED, 1, 5.

RESTRAINT OF MARRIAGE.

See WILL, 15, 16.

REVIEW OF JUDGMENT.

See JUDGMENT, 11; REAL ESTATE, ACTION TO RECOVER, 1, 2.

RIGHT OF WAY.

See ASSESSMENT OF DAMAGES; RAILROAD, 16; WATERCOURSE,

RULE IN SHELLEY'S CASE.

See WILL, 1, 9.

SALE.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 2 to 4; BAILMENT; CHATTEL MORTGAGE, 3; CONTRACT; MORTGAGE, 5; SCHOOL FUNDS, 3; STATUTE OF FRAUDS; TAXES, 6, 7; TAX LIEN, 2.

1. *By Wholesale to Retail Dealer.—Condition that Title Shall Remain in Vendor Until Payment.—When Fraudulent and Void.*—Where a manufacturer and wholesale vendor of articles of personal property sells upon credit and delivers a lot of such articles to a retail dealer for the apparent or implied purpose of resale, a condition in the contract of sale, that the title to the property shall remain in the vendor until the purchase-price is paid, is fraudulent and void as against a purchaser from the vendee. *Winchester, etc., Mfg'g Co. v. Carman, 31*
2. *Same.—Evidence.*—Testimony that the vendor expected and intended, when the sale was made to the retailer, that the latter should sell the property to the general public as soon as opportunity offered, without awaiting the maturity of notes given therefor, is admissible. *Id.*
3. *Conditional.—Personal Property.—Conversion.—Liability of Third Person.—Damages.*—A conditional sale of personal property is valid, and if the vendee, without the knowledge or consent of the vendor, sells the property to a third person, who converts the same to his own use, the latter acquires no title as against the original vendor, and is liable to him for the damages sustained. *Baals v. Stewart, 371*

SCHOOLS.

See SCHOOL FUNDS.

1. *Common Schools.—School Property.—Trusteeship.*—Under the Constitution and laws of this State, public school property is held in trust for school purposes by the persons or corporations authorized to control it, and the Legislature may, at its pleasure, provide for a change in the trusteeship. *School Tp. of Allen v. School Town of Macy, 539*
2. *Same.—Town.—When Entitled to Conveyance of Township Property.*—When a town is incorporated and organized as a school corporation, it succeeds the school township in which it is situated in all educational matters connected with the public schools within its limits, and the title to school buildings previously erected therein by the township vests in the town, and, under section 4508, R. S. 1881, it is entitled to a conveyance of such property for common school purposes. *Id.*

SCHOOL FUNDS.

1. *Expenditure in Anticipation.—Implied Pledge.*—Where the expenditure of any school fund has been lawfully anticipated, as by contracting debts or borrowing money on the faith of such fund when it becomes available, it is thereby impliedly pledged to the use to which it has been so applied in advance. *Zartman v. State, ex rel., 360*
2. *Same.—Mandamus.—Township Trustee.—Town.—School Buildings.*—Mandamus will not lie to compel a township trustee to pay to the school trustees of an incorporated town school funds which had been impliedly pledged by his predecessor, prior to the incorporation of the town, for the payment of a debt contracted by the township in the erection of a school building within the town limits, and which funds, otherwise, the school authorities of the town would be entitled to receive. *Id.*
3. *Sale by County Auditor of Mortgaged Land.—Suit for Deficiency.—Statute Construed.*—A county auditor who bids in, at public auction, land mortgaged to the school fund, can not proceed on the note executed by the mortgagor until he has made the subsequent sale required by

section 4393, R. S. 1881, and fails to realize enough to satisfy the amount due. *Clark v. State, ex rel., 388*

SECRETARY OF STATE.

See JURISDICTION, 1.

SET-OFF.

See DRAINAGE, 4; TAX LIEN, 1.

SHERIFF.

Escape of Prisoner.—*Action for.*—*Recapture.*—*Measure of Damages.*—*Bastardy.*—Where, during the pendency of an action against a sheriff, by the relatrix in a bastardy proceeding, for permitting the defendant in that proceeding to escape, the fugitive is re-arrested, although more than three months after his escape, and held in custody under a judgment recovered against him in his absence by the relatrix, the sheriff is liable only for actual damages. *State, ex rel., v. Hamilton, 33 Ind. 502*, and cases following it, distinguished. *State, ex rel., v. Newcomer, 243*

SHERIFF'S SALE.

See ATTORNEY'S LIEN, 4; FRAUDULENT CONVEYANCE, 2; INJUNCTION, 2; REAL ESTATE, ACTION TO RECOVER, 2.

SHORT-HAND REPORTER.

See BILL OF EXCEPTIONS, 2, 3.

SPEAKER OF HOUSE OF REPRESENTATIVES.

See JURISDICTION, 1.

SPECIAL FINDING.

1. *Exception to Conclusion of Law.*—*Admission as to Facts.*—Where the exception is only to the conclusion of law stated upon a special finding of facts, the facts are admitted to have been fully and correctly found. *Wynn v. Troy, 250*
2. *Same.*—*Failure to Find Essential Fact.*—If a fact upon which the liability of the defendant depends is not found, an exception to a conclusion of law that the plaintiff is not entitled to a lien upon the defendant's property, presents no question. *Ib.*
3. *Facts Not Found.*—*Presumption.*—Facts not stated in a special finding are presumed, as against the party having the burden of proof, not to exist. *Stix v. Sadler, 254*
4. *Same.*—*Fraud.*—*Chattel Mortgage.*—Fraud is a question of fact, and must be found as such. It is not enough to justify a judgment in favor of one who attacks a chattel mortgage on the ground of fraud, that some of the circumstances recited in the special finding might be deemed evidences of fraud. *Ib.*
5. *Exceptions.*—*Practice.*—Where the court finds the facts specially and states conclusions of law thereon, exceptions to the latter must be taken at the time the decision is made, and exceptions taken afterwards are not available, although the opposite party is present and does not object. *Hull v. Louth, 315*
6. *Same.*—*Practice.*—*Motion for Venire de Novo.*—Where a special finding of facts is so defective, ambiguous or uncertain that it ought to be corrected, the proper remedy is by a motion for a *venire de novo*. *Ib.*
7. *Failure to Find Facts.*—*Venire de Novo.*—Where a special finding is so indefinite, by reason of an omission to find the facts, that it is incapable of supporting any conclusions of law, or of forming the basis of any judgment on the issues involved, a *venire de novo* should be granted. *Cottrell v. Nixon, 378*

8. *Fraud*—Fraud is a question of fact, and in a special finding in a case where it is in issue, the fact itself must be found, and not the evidence of fraud. *Caldwell v. Boyd*, 447

SPECIFIC PERFORMANCE.

See STATUTE OF FRAUDS.

STATUTE.

See ASSESSMENT OF DAMAGES; ASSIGNMENT FOR BENEFIT OF CREDITORS, 1, 2; CITY, 16; CONVERSION, 2; CRIMINAL LAW, 2, 3, 7; DEED, 11; ELECTIONS; EVIDENCE, 6; FRAUDULENT CONVEYANCE, 3; HABEAS CORPUS; INTOXICATING LIQUOR, 1; JURISDICTION, 4; MECHANIC'S LIEN; MEDICINE AND SURGERY; QUIETING TITLE; SCHOOLS; TAXES, 1 to 3, 7; TELEGRAPH COMPANY; WILL, 16; WITNESS.

Construction.—*Legislative Intention*.—If the Legislature manifests an intention to create a system for the government of any subject, it is the duty of the court to effectuate that intention by such a construction as will make the system consistent in all its parts and uniform in its operation. *Lutz v. City of Crawfordville*, 466

STATUTE CONSTRUED.

See DEED, 11; ELECTIONS; EVIDENCE, 6; HABEAS CORPUS; MECHANIC'S LIEN; SCHOOL FUNDS, 3; WITNESS.

STATUTE OF FRAUDS.

1. *Contract*.—*Specific Performance*.—*Sale of Real Estate*.—*Husband and Wife*.—*Release of Inchoate Interest*.—*Mortgage*.—*Debtor and Creditor*.—A verbal agreement by a creditor with the wife of his debtor, that in consideration that she shall join her husband in a mortgage of real estate belonging to the latter, thus releasing her inchoate interest, he will, upon acquiring title through foreclosure and sale, convey to her a certain part of the property, is a parol contract for the sale of land within the meaning of the statute of frauds, and if the mortgagee refuses to convey, specific performance can not be enforced. *Green v. Groves*, 519
2. *Same*.—*Part Performance*.—*Payment of Consideration*.—*Continuation of Precedent Possession*.—Neither the continuation of a precedent possession, nor the payment of the consideration, in whatever form, is such part performance of a parol contract for the sale of land as will take it out of the statute of frauds. *Ib.*
3. *Same*.—*Refusal to Perform Contract to Convey*.—*Fraud*.—A refusal to fulfil a contract to convey is a moral wrong, but is not, in itself, such fraud as will justify a decree for a specific performance notwithstanding the statute of frauds. *Ib.*

STATUTE OF LIMITATIONS.

See REAL ESTATE, ACTION TO RECOVER, 6 to 8.

Disability.—*Infancy*.—*Marriage*.—Where the statute of limitations begins to run during infancy, it is not stayed by a marriage during non-age, nor the time for bringing the action extended by the intervention of the latter disability. *Sims v. Gay*, 501

STREET.

See CITY, 1 to 15; DEDICATION; INJUNCTION, 1; MORTGAGE, 6.

SUBROGATION.

1. *Payment of Debt of Another*.—One who, for the protection of his own property, is compelled to pay a debt, to which he is a stranger, and for the payment of which another is either legally or equitably bound, becomes entitled, on the principles of subrogation, to avail himself of

- all the remedies to which the person to whom the payment was made was entitled. *Weiss v. Guerinneau*, 438
2. *Same.—Liability of Party for Whose Use Money has been Paid.*—In such case, the party so paying money for the protection of his property, may maintain an equitable suit as for money paid to the use of the other. *Ib.*
 3. *Same.—Judgment.—Payment in Pursuance of.*—Where money has been paid in pursuance of a judgment, such judgment can not be interposed to prevent a recovery, in case the person receiving the money so paid fails to discharge an obligation against himself, which obligation, as a result of the same judgment, it became his duty to pay out of the money so received. *Ib.*

SUPREME COURT.

- See BILL OF EXCEPTIONS; CONTINUANCE, 1; CRIMINAL LAW, 22 to 24, 26, 30; EVIDENCE, 9; JUROR: PLEADING, 1, 3; PRACTICE; TRIAL, 3.
1. *Agreement.—Interpretation by Parties in Trial Court.—Theory of Case.*—Upon an appeal to the Supreme Court, the parties to an action will be held to the interpretation which they have placed upon an agreement in the trial court, and to the theory upon which the case was tried. *Adams v. Davis*, 10
 2. *Complaint.—Assignment of Error.*—If the sufficiency of a complaint is questioned for the first time in the Supreme Court, error must be predicated upon it as an entirety. *Ludlow v. Ludlow*, 199
 3. *Assignment of Error.—Sufficiency of Complaint.*—An assignment of error, that "the complaint does not state facts sufficient to constitute a cause of action," is not available for the reversal of the judgment, unless some fact essential to the existence of the cause of action has been wholly omitted from the complaint. *Laverty v. State, ex rel.*, 217
 4. *Appeal.—Motion for New Trial.*—Where the record shows that a motion for a new trial was made and overruled in the lower court, but the record does not disclose that any written causes for a new trial were filed, it will be presumed that no motion, accompanied by specified causes, as required by the statute, was presented to the court below. *LaFollette v. Higgins*, 241
 5. *Same.—Motion for New Trial.—Assignment of Errors.*—Objections to the finding of the lower court, or to its rulings on the admissibility of testimony, are available only by a motion for a new trial, and can not be presented for the first time by assignment of error in this court. *Ib.*
 6. *Weight of Evidence.*—A judgment will not be reversed on the weight of the evidence. *Cooper v. Williams*, 270
 7. *Rehearing.—Practice.*—Questions not presented and discussed on the original hearing of a cause will not be considered on petition for a rehearing. *Fleetwood v. Brown*, 567
 8. *Same.—Pleading.—Evidence.—Harmless Error.*—The Supreme Court will not look to the evidence to determine whether or not the sustaining of a demurrer to a good paragraph of answer was a harmless error. *Ib.*

SURETY.

See MARRIED WOMAN; PRINCIPAL AND SURETY.

SURFACE WATER.

See RAILROAD, 16; WATERCOURSE.

SURVEY.

County Surveyor.—*Conclusiveness of Decisions.*—Decisions by a county sur-

veyor are only conclusive, when not appealed from, in cases where he is called upon to perform a duty enjoined upon him by law.

Waltman v. Rund, 360

TAXES.

See EVIDENCE, 8; MANDAMUS; PAYMENT; QUIETING TITLE; TAX LIEN.

1. *Repeal of Law.—Collection of Prior Taxes.—Act of 1872.*—The collection of taxes assessed under the law in force prior to 1872 was not affected by the repeal of that law by the act of 1872. *Adams v. Davis, 10*
2. *Same.—Act of 1881.*—All taxes existing at the time the act of 1881 was passed were expressly preserved by that act, and were not affected by the repeal of prior laws. *Ib.*
3. *Same.—Presumption of Legality.*—It will be presumed, as provided by statute, that all taxes assessed upon property in this State were legally assessed, until the contrary is affirmatively shown. Section 6498, R. S. 1881. *Ib.*
4. *Same.—Lien Perpetual.—Dropping from Duplicate.—Reinstatement.*—The lien for taxes is perpetual until payment, and is not destroyed by the taxes being dropped from the duplicates for some intervening years and placed for those years upon a "register of doubtful taxes." *Ib.*
5. *Same.—Presumption that Taxes were Placed on Duplicate by Proper Officer.*—It will be presumed, in the absence of any showing to the contrary, that specified taxes were placed upon the duplicate in the treasurer's hands by the county auditor, whose duty it is to do so. *Ib.*
6. *Same.—Delinquent.—Distress and Sale.—Replevin.—Legality of Assessment.—County Treasurer.*—In an action against a county treasurer to replevin property distrained by him for delinquent taxes, if the duplicate in his hands is legal on its face, it is not necessary for him to show a legal assessment of the taxes. *Ib.*
7. *Same.—Authority of Treasurer to Collect.*—Under the act of 1881, the county treasurer, by virtue of the duplicates placed in his hands by the county auditor, has authority to collect delinquent taxes by distress and sale of personal property, at any time, whether before or after the April settlement, whether the list provided for by section 6427 has been made or not, and whether the delinquent taxes are charged upon the current duplicate or not. *Ib.*
8. *Same.—When Replevin will not Lie.*—Replevin will not lie to recover possession of property taken for a tax assessment. *Ib.*

TAX DEED.

See EVIDENCE, 8; QUIETING TITLE.

TAX LIEN.

See QUIETING TITLE; TAXES.

1. *Foreclosure.—Rents.—Set-Off.—Pleading.*—An answer to a complaint to foreclose a tax lien, that the plaintiff wrongfully took and retained possession of the land in controversy, and asking that its rental value be set off against any sum due the plaintiff, but not showing what interest the defendant has in the property or rents, is bad. Each paragraph of a pleading must be complete in itself. *Ludlow v. Ludlow, 199*
2. *Same.—Sale.—Limitation of Lien.—Mortgage.*—One who takes a mortgage on a tract of land which has been previously sold for taxes assessed upon it and another tract owned by the same person, is not entitled, in an action by the purchaser to enforce his lien, to have the mortgaged land relieved from the lien of the taxes assessed upon such other tract, and to have it confined to the latter. *Ib.*

TELEGRAPH COMPANY.

Penalty.—Negligence.—Act of 1885.—No penalty is recoverable under the act of April 8th, 1885, concerning telegraph companies, for a mere negligent omission to transmit a message. *Western U. Tel. Co. v. Swain*, 405

TENANCY.

See PARTITION.

TITLE.

See EASEMENT; ESTOPPEL, 2, 4; EVIDENCE, 8; PARTITION; PROMISSORY NOTE, 4; QUIETING TITLE; REAL ESTATE, ACTION TO RECOVER; SALE.

TORT.

See NEGLIGENCE.

TOWN.

See CITY; DEDICATION; QUO WARRANTO; SCHOOLS; SCHOOL FUNDS, 1, 2.

1. *Adoption of City Charter.—Election.—Quo Warranto.—Pleading.*—It is sufficient if a majority of the legal voters who vote at an election held in an incorporated town to determine whether a city charter shall be adopted, agree to the change, and an averment in an information to test the legality of the city organization, that a majority of the legal voters of the town did not vote in favor of the change, is insufficient. *State, ex rel., v. Town of Tipton*, 73
2. *Same.—Inspector's Statement.—Record of County Clerk.—Presumption of Discharge of Duty.*—When nothing is shown to the contrary, it will be presumed that the inspector of such election certified to the clerk of the circuit court a proper statement of the votes cast, and that the clerk made a record of the statement in his office, as required by law. *Ib.*
3. *Same.—Conclusiveness of Clerk's Record.—Census.*—The record made by the clerk is conclusive of the regularity of all the previous proceedings, except as to whether a majority of the votes given favored the adoption of a city charter, and it is too late to thereafter question the regularity of the census taken. *Ib.*
4. *Same.—Legality of City Organization.—Quo Warranto by Private Citizen.—Sufficiency of Information.*—An information in the nature of a *quo warranto* by a private citizen, to test the legality of a city organization, must show (1) that the relator is interested in the subject-matter, (2) that he did not by his vote, or otherwise, concur in the proceedings of which he complains, and (3) that, where there is no fraud or intentional violation of law, no public or private interest will be seriously affected by the granting of the relief demanded. *Ib.*

TOWNSHIP.

See DRAINAGE, 7; ELECTIONS; SCHOOLS; SCHOOL FUNDS, 1, 2.

TOWNSHIP TRUSTEE.

See CRIMINAL LAW, 4 to 11; DRAINAGE, 7; SCHOOLS; SCHOOL FUNDS.

TRESPASS.

See CRIMINAL LAW, 17, 18; RAILROAD, 2 to 6.

TRIAL.

See CRIMINAL LAW, 28; DRAINAGE, 3; HABEAS CORPUS; INSTRUCTIONS TO JURY; NEW TRIAL; SUPREME COURT, 1.

1. *Special Judge.—Failure to Sign Judgment.—Right to Sign at Subsequent Term.—Re-Trial.*—Where a cause is tried by a special judge, who neglects to sign the record of the final judgment, at the term at which it is rendered, he may sign it at a subsequent term. Such failure is

at most a mere irregularity, and does not entitle the judgment defendant to a re-trial. *Beitman v. Hopkins*, 177

2. *By Court.*—*Suit to Set Aside a Mortgage.*—A suit to set aside a mortgage is of equitable cognizance, and triable by the court. *Stir v. Sadler*, 254
3. *Erroneous Theory.*—*Supreme Court.*—*Reversal of Judgment.*—The trial of a cause upon an erroneous theory is a mis-trial, authorizing a reversal of the judgment, except where a just conclusion has been reached upon the merits. *Indiana, etc., R. W. Co. v. Quick*, 295

TRUST AND TRUSTEE.

See FRAUDULENT CONVEYANCE, 1; MORTGAGE, 7; SCHOOLS; WILL, 5 to 7.

1. *Will.*—*Advancement by Trustee.*—*Assignment of Income by Beneficiary.*—Where a testator sets apart a fund to be held in trust for the use of a son, the interest to be paid to him semi-annually during life, and at his death the principal to go to his heirs, an assignment to the trustee by the beneficiary of future income, to secure an advancement of money, is valid in the absence of fraud and of any testamentary or statutory restriction of the power of alienation. *Caldwell v. Boyd*, 447
2. *Same.*—*Fraud.*—*Loan by Trustee to Son.*—It is not a fraud *per se* for a trustee to loan a part of the trust fund to his son, if the loan is well secured. 16

VENDOR AND PURCHASER.

See DEED; NOTICE, 3; PROMISSORY NOTE, 4; SALE.

VENIRE DE NOVO.

See SPECIAL FINDING, 6, 7.

VENUE.

See JURISDICTION, 4; RAILROAD, 9.

VERDICT.

See INSTRUCTIONS TO JURY, 2; SPECIAL FINDING.

VOLUNTARY ASSIGNMENT.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; CHATTEL MORTGAGE.

WAIVER.

See PLEADING, 2.

WAREHOUSEMAN.

See BAILMENT.

WARRANTY.

See PROMISSORY NOTE, 3.

WASTE.

See WILL, 4.

WATERCOURSE.

Railroad.—*Surface-Water.*—*Obstruction of Water-Flow.*—*Liability to Land-Owner.*—A railroad company is not liable to a land-owner for injuries caused by the accumulation of surface-water on his premises, by reason of the construction of embankments on its right of way.

Hill v. Cincinnati, etc., R. W. Co., 511

WAYS.

See DEDICATION; EASEMENT.

WIDOW.

See ESTOPPEL, 4; WILL, 15, 16.

WILL.

1. *Life-Estate with Remainder to "Heirs."*—*Intention of Testator.*—*Rule in Shelley's Case.*—A will provided as follows: "I give and bequeath unto my son, James R. Rachels, during his lifetime, the following real estate," describing it, "to have the use of the above described land during said James' lifetime, and, after his death, to the heirs of his body bequeath [begotten] in lawful wedlock, and none others. I also give and bequeath to John C. Rachels, my son," certain described real estate, "said John to have the use of the same during his life, and, after his death, to his children bequeath [begotten] in lawful wedlock."
Held, that James R. Rachels took only a life-estate in the land devised to him, the fee going to his children.
- Held*, also, that the intention of the testator being plain, the rule in Shelley's case will not be allowed to defeat it. *Millett v. Ford*, 159
2. *Devise of Life-Estate.*—*Power to Dispose of Fee.*—A testator devised to his wife certain real and personal property for life, and directed that what should not be consumed at her death should be divided among his children.
Held, that she had power to convey the fee in the land, and might do so without referring to the will. *Silvers v. Canary*, 267
3. *Personal Property.*—*Life-Estate.*—*Power of Disposition.*—A bequest of personal property to a wife for use during her life, with power to control and manage the same, and at her death all remaining to go to grandchildren, vests in her a life interest, but with no absolute power of alienation. *Goudie v. Johnston*, 427
4. *Same.*—*Remainderman.*—*Protection of Interest.*—*Waste.*—One having an estate in remainder in personal property may maintain a suit against the life-owner for the protection of his interest. *Ib.*
5. *Trust.*—*Advancement by Trustee.*—*Assignment of Income by Beneficiary.*—Where a testator sets apart a fund to be held in trust for the use of a son, the interest to be paid to him semi-annually during life, and at his death the principal to go to his heirs, an assignment to the trustee by the beneficiary, of future income, to secure an advancement of money, is valid in the absence of fraud and of any testamentary or statutory restriction of the power of alienation. *Caldwell v. Boyd*, 447
6. *Same.*—*Fraud.*—*Loan by Trustee to Son.*—It is not a fraud *per se* for a trustee to loan a part of the trust fund to his son, if the loan is well secured. *Ib.*
7. *Trust.*—*Control and Disposition.*—A devise to a trustee, with no power of control or disposition, is ineffective, and the estate vests directly in the beneficiary. *Allen v. Craft*, 476
8. *Same.*—*Estate Tail.*—That which would have been an estate tail at common law is an absolute estate in fee, under the statutes of this State. *Ib.*
9. *Same.*—*Rule in Shelley's Case.*—A devise to M. A. "and her heirs forever," where it appears that the word "heirs" was used as a word of limitation, vests in the first taker, under the rule in Shelley's case, an estate in fee. *Ib.*
10. *Same.*—*Use of Word "Heirs."*—*Intention of Testator.*—The word "heirs" has a fixed, legal meaning, and can only be held to mean children, or to be a word of purchase, when it is clear that such was the intention of the testator. *Ib.*
11. *Same.*—When the word "heirs" is used as a word of limitation, it is treated as conclusively expressing the intention of the testator. *Ib.*
12. *Same.*—*Superadded Words.*—Superadded words which merely describe

- or specify the incidents of the estate created by such a word of limitation as the word "heirs," do not cut down the interest of the devisee. *Ib.*
13. *Same.—Issue.*—The word "issue" is ordinarily a word of limitation of the same force as the word "heirs." *Ib.*
14. *Same.—Estate in Fee.—Restriction Upon Right to Alienate.*—Where an estate in fee is created, a general restriction upon the right of alienation is without effect. *Ib.*
15. *Estate During Widowhood.*—An estate limited to the widowhood of a surviving wife terminates with her second marriage. *Sims v. Gay, 501*
16. *Devise of Estate During Widowhood.—Restraint of Marriage.—Words of Limitation and Condition.*—A devise of property to a wife "so long as she remains my widow" is a limitation of the estate merely, and not a condition in restraint of marriage within the meaning of section 2567, R. S. 1881, and upon a second marriage the estate terminates. *Summit v. Yount, 506*
17. *Construction.—Vested and Contingent Remainders.*—The law favors vested estates, and no remainder will be construed to be contingent which may, consistently with the intention, be deemed vested. *Harris v. Carpenter, 540*
18. *Same.—Survivorship.—Intention.*—Survivorship is generally, in the absence of an expressed or fairly implied intention to the contrary, construed to refer to the testator's death. *Ib.*
19. *Same.—Vested Remainder.*—A testator devised certain land to his wife for life, providing that "at her death the same shall be the property of and pass to my daughter, L., in fee; but if she, said L., be not living, then to her heirs forever."
- Held,* that the survivorship referred to the testator's death, and that the daughter took a vested remainder in fee. *Ib.*

WITNESS.

See CONTINUANCE, 2; EVIDENCE; FRAUDULENT CONVEYANCE, 3.

Suit in which Administrator is Party.—Statute Construed.—The proper construction of section 498, R. S. 1881, seems to be, that when a party to a subject-matter or contract is dead, and his rights in the thing or contract have passed to another, who represents him in the action which involves such contract or subject-matter, the surviving party is not competent to testify to matters occurring during the lifetime of the decedent. *Taylor v. Duesterberg, 165*

WORDS AND PHRASES.

See CITY, 4; JUDGMENT, 8; MECHANIC'S LIEN, 2; NEGLIGENCE, 2; WILL, 1, 9 to 13.

END OF VOL. 109.

E. J. A. A.



